



UNIVERSITY OF CAPE TOWN ADVANCED SCHOOL FOR LEGAL STUDIES-FACULTY OF
LAW

**PUBLIC PARTICIPATION AS A TOOL FOR THE REALISATION OF
SOCIO-ECONOMIC RIGHTS: THE PITFALLS OF STATE ORGANISED SPACES
OF PARTICIPATION**

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Wandisa Phama

DEDICATION

For my lovely mother Lovey Nomvuyo Phama. Wishing you were here, but in me you live on
everyday my Love!

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ABBREVIATIONS AND ACRONYMS

| | |
|-------------|---|
| ANCYL | African National Congress Youth League |
| AU | African Union |
| CC | Constitutional Court |
| ICCPR | International Covenant on Civil and Political Rights |
| MEC | Member of the Executive Council |
| MMC | Member of the Mayoral Committee |
| NCOP | National Assembly, National Council of Provinces |
| SCA | Supreme Court of Appeal SCA |
| SADC | Southern African Development Community |
| SGB | School Governing Body |
| SAHRC | South African Human Rights Commission |
| SASA | South African Schools Act |
| PEI Land | Prevention of Illegal Evictions from and Unlawful Occupation of Land |
| UISP | Upgrading of Informal Settlements Programme |
| CLOs | Community Liaison Officers |

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CHAPTER I

*“Holding government agencies accountable to the public is to some extent a matter of institutional design and internal checks and balances, but ultimately, it is the people whom the government supposedly serves who are responsible for monitoring its performance and demanding responsive behaviour”.*¹

ABSTRACT

Well over 23 years after the advent of democracy² and 20 years since the coming into effect of the Constitution of the Republic of South Africa, 1996 (“the Constitution”)³, the realisation of socio-economic rights is still a great concern in South Africa. Socio-economic rights are a class of rights concerning access to basic services like housing, water, sanitation, electricity, health and education.⁴ These rights are entrenched in the Bill of Rights of the Constitution. In the South African context, part of the reasons for including socio-economic rights in our Constitution and making them justiciable was explained by the Constitutional Court in the Certification judgment.⁵ Making socio-economic rights justiciable came from a need to alleviate the plight and poverty of poor black people who were structurally bound to live in deplorable conditions as a result of apartheid. The justiciability of socio-economic rights was established in the first cases pertaining to those rights in South Africa, for example the Certification Judgment.⁶

¹ F Fukuyama “State building, Governance and World Order in the Twenty-First Century”, 2004: United States Cornell University as cited in Ralph Mathekga & Imraam Buccus “The challenge of local government structures in South Africa: securing community participation”. Critical Dialogue—Public Participation (in Review), 2(1) 2006 at 15.

² Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 14.

³ Constitution of the Republic of South Africa, Heading, date of commencement 4 February 1997.

⁴ See section 26, 27 and 29 of the Constitution of the Republic of South Africa of 1996.

⁵ Certification Judgement Supra para 78.

⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26 (CC) at para 78.

As with all the other rights contained in the Bill of Rights, the state bears a constitutional obligation to protect, promote and fulfil socio-economic rights⁷. Thus, enshrined in the constitutional framework of our democracy are not only the rights to have access to basic services, but also the obligations of the state to realise those rights.⁸ Legislation has been developed to guide the state on how it ought to provide basic services and in some instances, legislation sets out the scope and the ambit of those rights.⁹ Part of the responsibilities of the state to provide basic services are its obligations to involve communities in the process of providing those services.¹⁰

Since the advent of our democracy, it has become apparent that there has been a backlog in the provision of basic services and realisation of socio-economic rights. This has been caused by many factors including corruption and the improper use of resources that are meant to be used for the provision of services. What has also made it possible for the state to be slow in the provision of the basic services is the way provisions pertaining to such services have been drafted. The Constitution requires the state to *progressively* realise socio-economic rights within its available resources.¹¹ Although there are justifications for such provisions in the Constitution, the unintended consequence of the open-ended nature of progressive realisation has been to give the state too much power to determine its own pace in realising such rights. This has been a problem because no one actually knows the timelines within which the state has to provide basic services. In instances where there are timelines, they are often pushed back at the will of the state and the idea of progressive realisation often makes it hard to question the open-ended timeframes the state sets for itself to provide basic services.

The backlog in the provision of basic services has come to mean that in 23 years of freedom we still have informal settlements communities living in deplorable conditions and still

⁷ Constitution of the Republic of South Africa section 7.

⁸ Section 26(2) and 27(2) of the Constitution of the Republic of South Africa of 1996.

⁹ Housing Act 107 of 1997; Water Services Act 108 of 1998 and Water Services Act Regulations: Compulsory National Standards and Measures to Conserve Water No. 22355 of 1998.

¹⁰ Municipal Systems Act 32 of 2000 and Municipal Structures Act 117 of 1998.

¹¹ Section 26(2) and 27(2) of the Constitution of the Republic of South Africa of 1996.

having to use bucket toilets as ablution facilities as it were the case under apartheid.¹² The unacceptable living conditions endured by predominately poor black South Africans are not fit for human habitation. They are man-made and are not normal. Such conditions certainly should not be experienced in our constitutional dispensation.

Over time, communities in South Africa have voiced out their growing frustrations with the slow pace of service delivery.¹³ What has exacerbated the frustration of those who live in deplorable conditions has been their lack of involvement in state structures where decisions pertaining to the provision of basic services are taken. To put it differently, the lack of responsiveness of the state to communities facing inhumane socio-economic rights issues and living in deplorable conditions has heightened the levels of frustrations of communities with the slow paced service delivery.¹⁴

As a result of their frustrations not being addressed by the state, communities have used protests as a means to voice their concerns and in attempts to demand plans regarding the improvement of their lives.¹⁵ Service delivery protests often follow a series of attempts by the communities to engage the state on the service delivery issues have failed.¹⁶

Studies have shown that there has been an increase in service delivery protests since 2004.¹⁷ This goes to show that over time it has become increasingly difficult for communities to receive responses from the state in relation to service delivery concerns.¹⁸ Protests have therefore been used as the space for frustrated communities to voice out their service delivery concerns when formal structures of involvement in state affairs fail.¹⁹ Over the years, service

¹² Penwell Dlamini 'Number of people living in informal settlements remains stubbornly high' Sunday World 1 June 2016 www.sundayworld.co.za (20 June 2017).

¹³ Hanna Brunlof 'Protests show that nothing has changed' Mail and Guardian 12 May 2014 www.mg.co.za (20 June 2017).

¹⁴ Zeenat Sujee 'Service delivery protests and the media' Daily Maverick 7 September 2014 www.dailymaverick.co.za (23 June 2017).

¹⁵ <http://www.sabc.co.za/news/a/e95ebe0040fe48b9a367fb3e43042439/Kliptown-residents-in-Johannesburg-protest-for-service-delivery-20170205> (22 June 2017).

¹⁶ Ibid.

¹⁷ Municipality IQ, Press Release: http://www.municipaliq.co.za/index.php?site_page=press.php (23 June 2017).

¹⁸ Zeenat Sujee 'Service delivery protests and the media' Daily Maverick 7 September 2014 www.dailymaverick.co.za (23 June 2017).

¹⁹ Ibid.

delivery protests have increased in number close to election times. Part of the increase in protests close to elections is because municipal officials are more visible in communities as they would often be campaigning for votes and therefore want to appear as though they take community concerns seriously.²⁰

It has also been reported that service delivery protests have increased in violence.²¹ The meaning of violence in service delivery protests can take different forms and at times has involved destruction to property and the looting of shops.²² Although by their very nature protests are disruptive to the status *quo*, there has been a bias in the media in reporting what has become known as violent protests. It would seem that every time a protest has been disruptive, that fact, in and of itself, has been recorded as violent. This position is incorrect. Disruption does not necessarily mean violence. Although a protest that would close-off a road going through a community will be disruptive to the lives and schedules of motorists, that does not automatically mean the protest is violent. Over and above that, the violence recorded and referred to does not take into account the structural violence that keeps communities bound in inhabitable informal settlements with no access to basic services. The structural violence that exposes local communities to criminal elements in their homes is as underreported as peaceful protests.

The lack of responsiveness by the state when asked about service delivery plans by local communities from spaces where they ought to be involved is contrary to what the law requires. The law places a duty on the state to facilitate public participation processes in doing their work.²³ Local municipalities were intended to be the arm of government that is close to communities to provide a responsive behaviour when government is asked of its development plans.²⁴ The inclusion of local communities in the development of plans to realise socio-economic rights is in actual fact legally sanctioned.²⁵ In part, it is the exclusion of local

²⁰ Kevin Allan and Karen Heese 'Understanding why service delivery protests take place and who is to blame' https://www.municipaliq.co.za/publications/articles/sunday_indep.pd (23 June 2017).

²¹ Dr. Zwelethu Jolobe 'The Crisis of Democratic Representation in Local Government' 2014 page 4 <http://wiser.wits.ac.za/system/files/documents/Jolobe2014-CrisisLocalGovernment.pdf> (10 April 2017).

²² Municipality IQ, Press Release: 2014 protest tally high, but with decline evident in March, 3 April 2014: http://www.municipaliq.co.za/index.php?site_page=press.php (11 May 2017).

²³ Municipal Systems Act 32 of 2000 and Municipal Structures Act 117 of 1998.

²⁴ Section 152(1) (a) of the Constitution of the Republic of South Africa, 1996.

²⁵ Section 152(1) (e) of the Constitution of the Republic of South Africa, 1996.

communities from the plans of state to deliver services which has led to an increase in service delivery protests.

OBJECTIVES OF THE PAPER

This paper seeks to investigate the legal structures and sources which provide for the obligations of the state to facilitate public participation in the realisation of socio-economic rights. The paper further explores the different interpretations of the notion of public participation in an attempt to critique and interrogate which kind of public participation actually allows for communities to meaningfully participate in the processes of the state to realise socio-economic rights.

The paper will argue that the effectiveness of the state in facilitating public participation in its affairs depends on the notion of public participation adopted in a particular state. It will further argue that the effectiveness of such participation by communities is dependent on the understanding that meaningful spaces for participation occur through power contestations. Participation may mean very little for the realisation of socio-economic rights if the power of the state over citizens is not challenged and contested in spaces of participation.

The paper will argue that for public participation to be meaningful in the realisation of socio-economic rights, it needs to occur in spaces in which the state will not have too much power over citizens to an extent that their participation is just for display. It will further argue that it is how people are perceived by the state and how they perceive themselves as citizens which determines their ability to challenge the state's power in spaces of participation.

When communities are treated as citizens because of the rights they have, public participation processes to discuss the provision of basic services are then facilitated with the understanding of how communities can partner with the state with influence and power that is required to take decisions to realise their rights. It is submitted that part of the frustration with the exclusion in spaces where socio-economic rights enforcement decisions are taken is created by how South Africans as citizens are not always treated as rights bearers who can challenge the state. The exclusion of communities from planning for service delivery by the state has become internalised by some communities as part of the rules of the game of governance. Such

internalised exclusion is a major contributing factor in the increased frustration with slow service delivery and a government that is unaccountable to the people.

The paper will argue that for public participation to be an effective tool in the realisation of socio-economic rights taking into account the theories of power, space and citizenship there is a need for public education on how communities can demand a responsive behaviour from the state beyond protests. There is further need for state officials for example to attend workshops on their obligations to facilitate public participation in planning for the realisation of socio-economic rights when they take office. The paper will further argue that, in order for public participation to be effective in contributing to the realisation of socio-economic rights, Chapter 9 institutions also need to play a more active and visible role in communities and assist to hold the state accountable to facilitate public participation as that is one of the most important factors in the realisation socio-economic rights.

The paper will argue that, although public participation is but one tool in the arsenal of tools to facilitate the realisation of socio-economic rights, it is important for many reasons. It is important for the manner in which it creates a space for decisions to be taken in an inclusive manner. The involvement of communities in the decision making processes of the state also legitimises the decisions so taken. Meaningful and inclusive public participation allows for a situation in which various options are put on the table in dialogues between the state and communities so that when a particular outcome is reached it could be what is best for those communities as other perspectives are heard and discussed.

METHODOLOGY

The arguments outlined above will be substantiated through desktop research and elements of “participant observation” research. This is a method of ethnographic research in which data is acquired through observing people and working with them on particular issues in their cause.²⁶ Participant observation has been used in Chapter IV of this paper which looks at the Gugulethu

²⁶ Tony L. Whitehead ‘Basic Classical Ethnographic Research Methods: Secondary Data Analysis, Fieldwork, Observation/Participant Observation, and Informal and Semi- structured Interviewing’ *Cultural Ecology of Health and Change*: 2005, 11.

case study, outlined below. This method has been used because the author had family which lived in the informal settlement at the time and was called upon to live with the community and assist in finding a solution to the socio-economic rights issues the community raised.

THE STRUCTURE OF THE PAPER

CHAPTER -I INTRODUCTION

This chapter contains the abstract, objectives of the paper scope and methodology of the study. It will also contain a synopsis of each chapter and what the paper is going to conclude.

CHAPTER II -PUBLIC PARTICIPATION IN THEORY AND ITS RELATIONSHIP WITH THE THEORIES OF CITIZENSHIP, POWER AND SPACE

This is the theoretical exposition of public participation. It will look at the origins of the concept of public participation and its meaning. It will also look at the relationship between public participation in theory and the theory of power and space, as developed by John Gaventa through his “power cube”.²⁷ It will also look at the relationship between public participation and the theory of citizenship.

CHAPTER III- LEGAL FRAMEWORK FOR THE DUTY TO FACILITATE PUBLIC PARTICIPATION IN STATE AFFAIRS

²⁷ John Gaventa ‘finding Spaces for Change: A Power Analysis’, IDS Bulletin volume 37 NO 6 November 2006:26.

The chapter explores the legal framework for public participation and its various interpretations through court decisions. It will consider international, regional, sub-regional and national instruments.

CHAPTER IV- THE SHORTCOMINGS OF INSTITUTIONALISED PUBLIC PARTICIPATION IN REALISING SOCIO-ECONOMIC RIGHTS

This chapter will examine why institutionalised models of public participation in South Africa are ineffective as mechanisms for communities' concerns to be taken into account when decisions about the realisation socio-economic rights are taken. This examination will be conducted through two case studies of complaints lodged with the South African Human Rights Commission (SAHRC).

CHAPTER V- THE CREATION OF SPACES OF PARTICIPATION BY COMMUNITIES AS AN ALTERNATIVE TO STATE CREATED PUBLIC PARTICIPATION SPACES - THE GUGULETHU CASE STUDY

The chapter makes an argument of how public participation which is sensitive to power politics in spaces of engagement between the state and communities could be more effective in demanding a responsive behaviour from the state. This argument will be made through exploring a case study of a community in Gugulethu, Cape Town, which created its own model of engaging the state in the face of a socio-economic rights crisis.

CHAPTER VI- CONCLUSION

This chapter will draw conclusions and submit recommendations.

CHAPTER II

PUBLIC PARTICIPATION IN THEORY AND ITS RELATIONSHIP WITH THE THEORIES OF CITIZENSHIP, POWER AND SPACE

2.1 The Meaning of Public Participation

The concept of public participation is an old phenomenon in relationships between citizens and the state. It is, in theory, the bedrock of any modern democracy, which becomes a common interest between the government and the governed.²⁸ However, what public participation means varies depending on the particular context. Yet, regardless of the various meanings attributed to public participation which is at times called “citizenship participation” or “public involvement”, the most important feature to be cognisant of in an attempt to define it is the fact that participation is a political concept and not just a technical one.²⁹ The mere denial of its political nature is in itself political and undermines the fact that public participation is a political power struggle aimed at ensuring that those who demand to participate actually do so. Therefore, in practice, the notion of public participation means a remedial political process by which the “excluded” in decision making processes struggle for power to be deliberately included in the future.³⁰

Although there is no single definition of public participation, a number of typologies of public participation have been developed to give meaning to the concept. In the sixties, Sherry Arnstein developed a typology known as a “ladder of citizenship participation” (“the ladder”) in an attempt to unpack what the loaded term of participation means depending on context.³¹ The ladder identifies eight typologies of public participation or non-participation.

Arnstein argues that through assessing their effects in decision making processes, public participation typologies may be grouped into three. The lowest forms of participation in her ladder are classified as “non-participation”. In this level, one finds two forms of public

²⁸ Arnstein R. Sherry ‘A ladder of citizen participation’, AIP Journal July 1969, 216.

²⁹ Cornwall Andrea ‘Unpacking ‘Participation’, models, meanings and practices’: Community Development Journal Vol 43 No. 3 July 2008, 281.

³⁰ Arnstein op cit note 28 at 16.

³¹ Ibid.

participation, namely, “manipulation” and “therapy”. A manipulative form of public participation is a “space” in which citizens or those who struggle for power are invited to engage with the state on their issues in the hope that they will merely rubberstamp a decision that has already been taken by the state.³² This model of public participation is manipulative in the sense that even though the voices of the citizens are echoed, they are not influential in the decision-making process because they are not taken into account and therefore not heard.

A therapeutic model of public participation is designed to give those who are trying to claim power a sense of feeling like they are being heard. People are invited to raise their frustrations and assured that something is being done to resolve them.³³ According to Arnstein, those who hold positions of power in this space and call for participation, use it to only explain complex issues pertaining to the development that is being proposed. This model shuns the authenticity of people’s concerns and treats them as though they need to be helped to cure their ignorance of the developments the state decides on prior to facilitating public participation. Arnstein argues that this model of participation is both “dishonest and arrogant”.³⁴ The common feature between the manipulation and the therapy model is that their real objective is not to enable people to participate in planning development that will affect them but to enable those in power to “educate” or “cure” those who demand the power to be shared.³⁵

Following the non-participation category in Arnstein’s ladder is the “degrees of tokenism” category. This category creates space for those who demand power to be shared or citizens to use their voices to echo their frustrations. Tokenism provides a space for people to speak. However, the defect in this category lies in the fact that having a voice does not mean that one’s voice will be heeded to by the “powerful”.³⁶

The “degrees of tokenism” category includes the “information sharing” model of public participation. Although information sharing is a step in the right direction to facilitate public participation, the flaw identified by Arnstein in this model is that it becomes a one-way flow of

³² Ibid at 218.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid at 217.

information.³⁷ Officials merely provide information to citizens without allowing for feedback or negotiation on aspects of that information. The process of this participation ends up being a space where technical terms are thrown in the air as justification for slow development without giving people opportunities to question the decision to choose certain modes of development over others.³⁸

The next category on the ladder is consultation. This is a very popular model of public participation in many jurisdictions across the globe, including South Africa. In this model, the population is invited to share their opinions on issues. However, those opinions amount to nothing if this model is not used in conjunction with other models of participation, because there is no guarantee that people's opinions will be considered.³⁹ What becomes important after a consultation process is whether there are measures put in place to make the decision in a way that takes into account opinions shared in a consultation process. A dominant method of this form of participation in South Africa is through public hearings or *imbizos*. People are consulted to give their opinions, but if this model is not used with the intention of making changes as a result of those opinions, the consultation becomes a futile exercise which is used to legitimise decisions taken prior the consultation.

The last typology of participation in this category is what Arnstein calls "placation". She argues that in this level participation affords participants some degree of influence but also has some elements of tokenism. This model includes having a few handpicked members of the community at the deliberation tables with the state. The challenge, though, is that if those elected members are not accountable to the rest of the population that will be affected by the decision then there is no real participation for all.⁴⁰ In this model of participation, participants are given the opportunity to advise decision makers; however, the power to determine the legitimacy of that advice still rests with the decision makers.⁴¹

³⁷ Ibid at 219.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid 220.

⁴¹ Ibid.

Arnstein's last category of typologies of public participation is "citizenship power". This category consists of three forms of public participation. The first form Arnstein identifies in this category is partnership. In this context partnership as a form of public participation means power is redistributed through negotiation between citizens and power-holders.⁴² The partners agree to share planning and decision making responsibility to make participation for both parties more tangible.⁴³ Nonetheless, the success of this typology is beneficial to participants only if there is a strong power-base in the community to which the leaders are accountable.⁴⁴ Although this category is successful because of partnership between citizens and the state, the partnership also comes about as a result of power struggles. In other words, the shift in the power dynamics between the state and the citizens is a contested and consistent power struggle. The power is not handed over to the citizens; it is fought for.⁴⁵

Arnstein refers to the second form of power in this category as "delegated power". In this model of public participation, citizens assume a more powerful role in negotiations with the state on a particular issue. An example of this model of public participation is Brazil's participatory budgeting system.⁴⁶ This is a system where citizens decide for themselves how they think the national budget ought to be spent and the government is kept accountable through progress reports.⁴⁷

The last typology of participation in this category is "citizen control". In this category, citizens demand a degree of power which will ensure that participants can govern a program or an institution.⁴⁸ In this model, communities tend to take up more power to shape the developments in their lives. Arnstein gives an example of a set-up where a community demands a community-controlled school.⁴⁹ In part, this is what School Governing Bodies in South Africa

⁴² Ibid 221.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Celina Souza 'Participatory budgeting in Brazilian cities: limits and possibilities in building democratic institutions Sage Journal', *Environmental and Urbanisation* vol 13 No 1 April 2001, 159.

⁴⁷ Ibid.

⁴⁸ Ibid 223.

⁴⁹ Ibid.

were intended to do: to assist in governing schools while taking into account the needs of a particular community that those who sit at national government are not always aware of.

Arnstein concedes that the typologies are not perfect in defining public participation. She argues that they are imperfect because they tend to treat either those who make decisions and the “public” as homogenous groups.⁵⁰ Moreover, they do not take into account that in the real world, people’s participation is complex and there may be overlaps between the eight typologies.

2.2 Forms of public participation

Although the ethos of the meaning of public participation can be better understood through categorising a number of forms of participation into typologies, Sarah C. White notes that those typologies make sense when we also understand that what participation means also varies because there are a number of competing interests in participation spaces.⁵¹ To unpack the meaning of these interests, White also puts forward a further typology of forms of participation.

White identifies four types of participation. Figure 1 below sets out these forms and their characteristics.⁵² The first column of the table shows the form of participation. The second shows the interests in that form of participation from a “top-down” perspective. The third shows the interest of that form of participation from a “bottom-up” perspective. And the fourth column depicts the overall function of each form of participation.⁵³

Figure 1:

| Form | Top-down | Bottom-up | Function |
|---------|--------------|-----------|----------|
| Nominal | Legitimation | Inclusion | Display |

⁵⁰ Ibid 217.

⁵¹ White C. Sarah “Depoliticising development: the uses and abuses of participation” *Development in Practice*, Volume 6, Number 1, February 1996: 6.

⁵² Ibid 7.

⁵³ Ibid.

| | | | |
|----------------|----------------|-------------|-----------|
| Instrumental | Efficiency | Costs | Means |
| Representative | Sustainability | Leverage | Voice |
| Transformative | Empowerment | Empowerment | Means/End |

White uses these typologies to prove that what we understand as participation is in and of itself contested. In other words, although the government and citizens may employ the same form of participation, their interests in that same form of participation may differ.

Over and above trying to unpack the meaning of participation through typologies, it is also important to consider that in practice participation will mean different things depending on who participates in what.⁵⁴ This becomes important because without paying attention to the issue of who actually participates in decision making processes, public participation becomes more of a form of tokenism than substance.⁵⁵

When one considers the question of who participates, one will essentially discover that in a group of those who demand participation, although they may all seem to be participating, some will be included while others are excluded. The groups of the included and the excluded are themselves not homogenous and the reasons for inclusion or exclusion vary depending on context.

According to Andrea Cornwall, in resolving the question of who participates, one must understand that there is a distinction between participation of representatives and participation where the community seeks more direct participation.⁵⁶ Participation of representatives will only be for a select few who will hopefully report to the wider group that demands to be heard. This

⁵⁴ Cornwall opt cit note 29, at 275.

⁵⁵ Ibid.

⁵⁶ Ibid 277.

model of participation is often favoured for practical reasons. For instance, in litigating big socio-economic rights cases in South Africa, it becomes pragmatic to have the group that needs representation select a committee that will represent it for purposes of the case. The committee will be the people the lawyers will communicate with in crafting the case for the broader group. Ideally, the information the committee conveys to the lawyers is what the rest of the community wants to be conveyed.

However, at times communities participate in decision making processes directly rather than through representation. This form of participation can also be seen in election processes where people vote directly to elect their chosen representatives. It can also be seen in public meetings with the state.

However, none of these forms of who participates negates the fact that some people may be excluded from participatory spaces. In representation participation for instance, if the representatives are not held to account by the larger segments of the community, the larger community is excluded from participation. Where people participate directly, the more vocal members of the community will ordinarily speak more than those who are not so confident, in which case those segments of the community become excluded. The cultural context in which a participation space is created also determines who the excluded and included are in a space. For instance, although the state may want to consult with an entire community on a particular issue, women may be silent in that space because culture may dictate that they do not speak in front of men. At times, the basis of exclusion to those present in a participation space may be age; the youth may not be allowed to speak in front of their elders.

Another cardinal aspect of public participation, regardless of the context, is the relationship and correlation between participation and citizenship. It is the forms of citizenship observed in each state that will determine the level and nature of public participation which is expected in that state. The section below will examine the relationship between citizenship and public participation.

2.3 Citizenship and public participation in state affairs

Like public participation, there are many different schools of thought on what citizenship is. For instance, “liberals” see citizenship as a status which entitles individuals to claim a specific set of universal rights in a country they belong to or even arguably as global citizens.⁵⁷ Autonomy and the agency (one’s capacity to act) to claim those rights by citizens are often assumed, as citizens are perceived to have a choice as to whether to exercise their rights or not.⁵⁸ However, communitarians dispute the individualistic nature of citizenship entrenched in the liberal view. At the foundation of this school of thought is the belief that a person’s identity is shaped by how she interacts with other members of the community. Therefore, the manifestation of citizenship depends on how it is understood in a society.⁵⁹ At times citizenship is understood as a state upon which people enjoy rights necessary for agency and political participation.⁶⁰

Additionally, citizenship may also differ from one state to another, based on factors such as the nature of government in that country. For instance, if the government is a monarch like Swaziland, citizens are deemed to be subjects of the king. If a country is a representative democracy, citizens are seen as members of the community with the ability to elect people into political office during periodic elections. Citizenship is also understood as a right with entitlements attached to it. For example, in South Africa, what citizenship means in law is entrenched – at least partly – in the Constitution. Indeed, although section 3 of the Constitution does not define citizenship, it states that there is a common South African citizenship.⁶¹ The section further states that all citizens are equally entitled to rights, privileges and benefits of citizenship.⁶² Furthermore, they are equally subject to the duties and responsibilities of citizenship.⁶³

Notwithstanding the notion of citizenship as a right entitling people to act in a particular manner or to achieve certain objectives, how people understand their identity as citizens will

⁵⁷ John Gaventa ‘Exploring Citizenship, Participation and Accountability’ IDS Bulletin vol 33 NO 2, 2002:4.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ The Constitution of the Republic of South Africa of 1996, S 3(1).

⁶² S 3 (2) (a).

⁶³ S 3 (2) (b).

often affect how they participate in policy decisions that will affect their lives. Therefore, it is not enough to say citizenship means what the laws of a country define it to mean. What is also important is how people perceive themselves as citizens.⁶⁴ People's perception of their citizenship is important because that determines whether they will assert their citizenship rights through seeking greater accountability from the state.⁶⁵

As Cornwall and John Gaventa point out, people's understanding of citizenship and how they are perceived as citizens will affect the three main ways in which they participate in state affairs when policies that affect their lives are considered. First, people either participate in state affairs as "users" of services provided to them by the state.⁶⁶ Users do not have control over the nature of services that they receive from the state; they must accept the service or not get any services at all.⁶⁷ The only role users have in engaging with the state is that of observers who monitor the efficiency of the service delivery and reports to the state if there are challenges. Other than being a monitor, a user cannot voice concerns and has no choice to determine the services that she should be getting.⁶⁸

Secondly, citizens participate in state affairs as "choosers". This model of participation gives communities more control over the form of service delivery in their lives. Communities can play the role of choosers through organising themselves to choose the kinds of services they want, who gets them and how.⁶⁹ The weakness of this model is that community members who are less powerful and less assertive may be overpowered by those who are in choosing services.

Thirdly, people as participants in state affairs have also been perceived as "*right-bearers*" with the agency to hold the state accountable.⁷⁰ This form of public participation is more direct than the other two, as it perceives citizens as social agents that the

⁶⁴ Ibid.

⁶⁵ Andrea Cornwall and John Gaventa "From Users and choosers to makers and shaper: Repositioning participation and Social Policy" IDS Bulletin Vol 31 No 4 2000: 54.

⁶⁶ Ibid at 56.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid at 59.

state has to engage with directly when decisions that affect their lives are taken.⁷¹ Right-bearers are people with the right to participate on the basis of what the laws provide.

Nonetheless, as articulated above, any understanding of citizenship participation in state affairs that does not consider the nature of the contested power between actors in deliberation spaces falls into a trap of assuming that the spaces of deliberation will be used equally by all actors.⁷² The existence of a space to participate in a decision does not guarantee equality between the various actors. There will always be a political contestation for power to set the agenda, determine the outcome and decide who participates.⁷³

The connection between power and citizenship is very important to consider when looking at the meaning of public participation. The section below will consider what spaces for public participation are, the power dynamics at play in those spaces and its implications for public participation.

2.4 Spaces, Power and Participation

Cornwall identifies two kinds of spaces for participation.⁷⁴ The term “space” in this context is used to define opportunities, moments and processes where citizens are actively involved in doing something that will affect policy and decisions that will impact their lives.⁷⁵ Cornwall argues that there are “invited spaces” and “popular spaces”.

Invited spaces can be opportunities for public participation for particular purposes in decision-making processes. For example, if the state is drafting a policy and there is legislation that demands it to consult the public, the state will open up space in its drafting process to allow the public to make representations and then close the space again.⁷⁶ The inadequacy of invited

⁷¹ Ibid.

⁷² Gaventa op cit note 57, at 10.

⁷³ Ibid.

⁷⁴ Andrea Cornwall ‘Introduction: New Democratic Spaces the Politics and Dynamics of Institutionalised participation’, IDS Bulletin 35.2: 2004 at 1.

⁷⁵ John Gaventa ‘finding Spaces for Change: A Power Analysis’, IDS Bulletin volume 37 NO 6 November 2006:26.

⁷⁶ Ibid.

spaces as a platform for giving people an opportunity to participate lies in the fact that the state may use its power and influence in the process to suppress opposing views. In that case, even those who are present at the deliberations with the state will only occupy that space in form and not in substance. When such a situation occurs in a space for negotiating and asserting rights, the space is called an “empty invited space”.⁷⁷ In her typologies of participation, Arnstein would call participation in such spaces “non-participation”. Here, participation can take three forms, manipulation, therapy or tokenism. It would be a process that is not intended for the participants to influence the decisions that are ultimately made. Instead, it would constitute a space opened for the participants to be used as tokens to rubberstamp a decision or to manipulate the participants or to function as therapy for the participants.⁷⁸

In contrast to invited spaces, “popular spaces” are not created by government. They represent a bottom up approach to public participation.⁷⁹ These spaces are opportunities that people create for themselves as alternatives to the state invited spaces. Popular spaces are used by the people to mobilise, build arguments and alliance, and encourage each other to use their own voices to compel the state to hear them.⁸⁰ The benefit people derive from popular spaces is that they are able to criticise the government standing on the outside of the politics that play out in the invited spaces. Beyond criticising the government, popular spaces also give people a chance to imagine and voice out alternatives to the policy propositions forwarded by government.⁸¹

These kinds of spaces for public participation correlate with the typologies of participation in the “citizen power” category of Arnstein’s ladder of participation. Participants in popular spaces create public participation processes in such a way that they retain some power in how such participation takes place. Popular spaces afford participants an opportunity to decide for themselves what issues matter to them and with whom they want to discuss solutions, on their own terms, to the challenges they face. In popular spaces, participants either function

⁷⁷ Ibid at 5.

⁷⁸ Arnstein op cit note 28.

⁷⁹ Ibid at 6.

⁸⁰ Ibid.

⁸¹ Ibid.

from a space of choosers or even right-bearers as citizens. They choose services and want to hold those who must implement them to account.

Gaventa identifies a third space in which policy decisions are made. He calls this space a “closed space”.⁸² The decision making process in closed spaces is only open to a few elites and there is no pretence about broadening it.⁸³ In this space, decision makers make decisions and provide services to the people without necessarily consulting them about those services.⁸⁴ Here, the only form of public participation, if one employs Arnstein’s ladder, will fall in the non-participation category.⁸⁵

Nonetheless, in any space opened or closed to public involvement in state affairs, there are power dynamics at play. Power is an undeniable element in any public participation model or space. Gaventa develops a power typology to describe power in this context.⁸⁶ His typology argues that there are five kinds of power which could be examined to assess the depth of public participation in any context. It is the specific kind of power possessed by people in any space which will determine whether participation will be real or not.

Gaventa argues that there is *power to* do something; this may be when people decide to approach the state and call it to account for its decisions that affect their lives.⁸⁷ The power lies in the ability to call the state to account. There is also the *power over*.⁸⁸ This kind of power is when someone or something has the power over others; it could be a form of oppressing power. This is also the same power which is in operation in spaces where citizenship is under the rule of a monarchy. The King has the power over his subjects. There is the *power with*; it entails a partnership between stakeholders towards achieving a common goal.⁸⁹ Then there is a *power within*; which refers to when people gain awareness about their identities. For example, how

⁸² Gaventa op cit note 75 at 10.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Arnstein op cit note 28.

⁸⁶ Gaventa op cit note 75 at 26.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

they see themselves as citizens of a particular country determines how they act when decisions negatively affecting their rights are made.⁹⁰

In any public participation space, it is important to emphasise that the value of participation will always depend on who holds the power in that space. In Arnstein's "non-participation" typology, be it manipulation or tokenism, the most common power at play in a public participation space would be 'power over'. As a result of the fact that in that space of participation citizens will be perceived as users of services whom the state calls to public participation just to rubberstamp decisions that were taken without them, the state will have power over the participants to manipulate them in rubberstamping a decision. Such public participation space is an empty invited space and cannot lead to any meaningful participation.

Gaventa further argues that there are three forms of power when issues are discussed and negotiated.⁹¹ There is the *visible power*; this refers to political power as entrenched in formal rules, legislation or structures in an institution. This will be evident in a case where one decision maker is given the power to make the final decision on something. For instance, in the case concerning school closures in Cape Town, the Member of the Executive Committee ("MEC") for Education had the power to decide whether to close a school after consulting with the relevant stake holders.⁹² In that case, it was always clear going into the public participation space who the ultimate decision-maker was.

Then there is *hidden power*; this mainly works to exclude certain people and issues from the deliberation table. Some elites hold this power to decide who gets to be part of the deliberations and what the agenda should be.⁹³ This form of power is what is found in Arnstein's delegated power where a select few are allowed in the deliberation space where others are excluded. For the public to withstand the force of this power in engagements with the state, people have to mobilise to use their voices as a collective to decide the agenda, the place, the time and who gets invited. This is why it is important to decide from the onset who gets to

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² *Beauvallon and others v the MEC of education in the Western Cape and others* (22507/12) [2013] ZAWCHC 66 (19 March 2013).

⁹³ Gaventa op cit note 75 at 29.

participate in decision making processes to avoid the exclusion of those who want to participate but get left behind.⁹⁴ Nonetheless, hidden power also illustrates the point that in a public participation process the “public” is not a homogenous group, there are power dynamics that will be at play within the group called the “public”.

Lastly there is *invisible power*, which not only serves to keep certain factors off the deliberation table, but also off the minds of those taking part in deliberations. In a state where the public is seen as total outsiders when decisions that will affect their lives are made, people are likely to internalise that view and think that their exclusion is in accordance with the rules of the game. This may lead to social acceptance of gross human right violations. In this context, if people are not aware of the powers that come with their citizenship and are treated as users or choosers instead of right-bearers, they may internalise their treatment and fail to hold the state to account. When people have internalised their exclusion, even in a context where a state knows it needs to account, it may not because invisible power allows it.⁹⁵

In light of the above discussion, it is not enough to have on paper that people have a right to public participation. From written rules about people’s rights to participation, we cannot assume that people will always be able to participate. When we think of the meaning of public participation, there are four important factors to be considered: the type of participation (typology), the identity of who participates, the space in which they participate and the power dynamics at play in that space. These factors collectively determine the value that public participation will have in a decision-making process.

In thinking of whether or not public participation is effective as one of the tools to ensure the realisation of socio-economic rights, all the three factors must be taken into account. Currently in the South African context, there is an appreciation in terms of the law that when socio-economic rights are to be realised or implicated in a litigation process there ought to be public participation. However, whether that public participation will be influential in the process depends on the type of participation it is. In some instances, although there is space created for

⁹⁴ Arnstein op cit note 28.

⁹⁵ Ibid.

participation that space may be for non-participation in which case the only value of that space is for the state to look as though participation is being facilitated. Without understanding the concept of power and how it affects the space for participation, it is almost impossible to determine whether public participation facilitates the realisation of socio-economic rights.

In the next chapter, this paper will discuss how public participation has been defined in the South African context and its legal framework.

CHAPTER III

LEGAL FRAMEWORK FOR THE DUTY TO FACILITATE PUBLIC PARTICIPATION IN STATE AFFAIRS

Introduction

The importance of public participation in state affairs for any democracy cannot be understated. This holds true even for South Africa's democracy. South Africa has a deep history of exclusion of large segments of society from political spaces of power when important decisions are taken. In an attempt to move beyond that history and to ensure that the public actually takes part in decision making processes, public participation in South Africa is entrenched in law and policies. This chapter examines the legal framework that makes it possible for the people of South Africa to demand inclusion in decision making processes, as well as accountability and responsive behaviour from the state.

3.1 International Obligations

South Africa has international and regional obligations to encourage and facilitate public participation in state affairs. Chapter 14 of the Constitution makes international law applicable in South Africa. In terms of section 232 of the Constitution, customary international law is law in the Republic unless it is inconsistent with the Constitution.⁹⁶ This section means that if there is any customary international law principle that requires the facilitation of public participation in state affairs, the principle is applicable in the Republic unless it is inconsistent with the Constitution. The Constitution further obliges courts to prefer an interpretation of any legislation that is consistent with international law over an interpretation which is not.⁹⁷

⁹⁶ Section 232 of the Constitution of the Republic of South Africa.

⁹⁷ The Constitution of the Republic of South Africa opt cit note 1, S 233.

The section below will consider international obligations that require South Africa to ensure public participation in its state affairs. For the purposes of this thesis, these obligations will be considered as separate international and regional obligations. By international obligations, this thesis refers to international treaties that South Africa has signed and ratified outside of the continent, regional obligations refer to treaties that South Africa has signed and ratified in terms of its membership of the African Union and sub-regional obligations are those South Africa has within the Southern African Development Community (SADAC) .

International law, which South Africa has a duty to uphold, recognises people's rights to have their dignity respected. Embedded in the right to respect human dignity is the right of all people to be heard when matters which affect their lives are discussed. In keeping with this right, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) ascribes to everyone a general right in public affairs of his/her country.⁹⁸

Moreover, General Comment No 25, which was passed to give effect to **Article 25** of the ICCPR, explains the obligations of state parties to ensure that citizens participate in public affairs and explains in detail the rights of citizens to participation.⁹⁹ The Comment makes three important points on the right of participation in state affairs under Art 25. Firstly, the right entails taking part in periodic elections. Secondly, the right to participate entitles citizens to directly take part in popular assemblies which have the power to make decisions about local issues in between elections.¹⁰⁰ Lastly, individuals have the right to take part in public affairs by exercising influence through debate and dialogue with their representatives or through their capacity to organise themselves.¹⁰¹ According to Karen Czapanskiy and Rashida Manjoo, this provision imposes a duty on the state to ensure that citizens have an opportunity to exercise their rights to participation.¹⁰²

⁹⁸ ICCPR Article 25 (a).

⁹⁹ *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : 07/12/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)*

¹⁰⁰ Ibid para 6.

¹⁰¹ Ibid para 8

¹⁰² Karen Syma Czapanskiy and Rashida Manjoo 'The right of public participation in the Law-making process and the role of Legislature in the promotion of this right' *Duke Journal of Comparative & International Law* 2008 vol 19:1at 7.

As the ICCPR is applicable in South Africa, General Comment No 25 has three important implications for South African citizens. First, as a representative democracy, the country must ensure that during election periods all eligible candidates have an opportunity to take part in the elections and appoint their representatives. Secondly, the state must also ensure that citizens have a right to be part of public gatherings where decisions that will have implications for their lives are made. Lastly, that organised groups of citizens should be encouraged and the ability of such groups to influence public affairs must be recognised and respected.

In socio-economic rights cases, various mechanisms also require the participation of those who are going to be adversely affected by socio-economic choices made by state parties. According to the United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement,¹⁰³ “all persons potentially affected by evictions including women, indigenous people and people with disabilities as well as those who work on their behalf have a right to relevant information, full consultation and participation throughout an entire eviction process and the right to propose alternatives which those who make the decisions should consider”.¹⁰⁴

The guidelines acknowledge the power imbalances that could exist in public participation spaces. They specifically state that “[s]pecial efforts should be made to ensure equal participation of women in all planning processes and in the distribution of basic services and supplies”.¹⁰⁵

3.2 Regional Obligations

South Africa also has obligations at a regional level to ensure its citizens’ rights to participation in state affairs. As a signatory to the African (Banjul) Charter on Human and Peoples’ Rights (African Charter),¹⁰⁶ South Africa should ensure that its citizens enjoy the rights entrenched in

¹⁰³ “United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement” http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.

¹⁰⁴ Ibid para 38.

¹⁰⁵ Ibid para 53.

¹⁰⁶ African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

the Charter.¹⁰⁷ The right to participation in state affairs is entrenched in article 13(1) of the Charter:

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen shall have the right of equal access to the public service of his country.”

In matters pertaining to the right to participate in state affairs, the African Charter is more progressive than other international instruments in the sense that it does not only afford citizens the right to participate, but it also places positive obligations on Member State to educate citizens about the right.¹⁰⁸ Indeed, the Charter dictates that Member States promote and ensure respect for the rights and freedoms contained in the Charter through teachings, education and publications.¹⁰⁹ This would mean that it is not sufficient for South Africa to enact laws which incorporate the right to public participation and infuse principles of a participatory democracy. The country must subsequently give people guidance on how to participate in state affairs.

3.4 Sub-Regional Obligations

South Africa is an active member of the Southern African Development Community (‘SADC’). SADC comprises of 14 members states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.¹¹⁰ As a community, SADC has various instruments that require public participation of local communities that are affected by both inter-state engagements and by decisions within their states.¹¹¹

To facilitate public participation of groups and communities within their member states, SADC incorporates principles of participation in its various instruments to various degrees.

¹⁰⁷ Art 2 of the African Charter.

¹⁰⁸ Czapanskiy and Rashida Manjoo op cit note 102 at 7.

¹⁰⁹ Art 25 of the African Charter.

¹¹⁰ Micheal Kidd and Nevil W. Quinn ‘Public participation in Southern African watercourses’ in Carl E. Buch (ed) *Public Participation in the Governance of International Freshwater Resources*, United Nations University Press (2005) 156.

¹¹¹ Ibid.

Article 13 of the SADC Protocol on Gender and Development (Gender Protocol)¹¹² places an obligation on states to ensure the participation of women in development issues. The Gender Protocol requires of its member states to ensure the equal participation of women in matters pertaining to leadership, decision-making, gender-mainstreaming and the changing of discriminatory attitudes against women.¹¹³

In order to promote and enhance food security and human health as well as to safeguard the livelihood of fishing communities, (SADC adopted) the Protocol on Fisheries. The Protocol further aims to generate economic opportunities for nationals of states within the region and to alleviate poverty with the ultimate objective for its eradication. In addition, the Protocol also requires member states to facilitate the participation of stakeholders in fisheries.¹¹⁴

South Africa is signatory to all the above mentioned instruments of SADC and it must respect these provisions.

3.5 National Obligations

At a domestic level, the importance of participation is so deeply entrenched in the Constitution such that the word “participation” appears 141 times in its text. When the term “participation” appears in the Constitution, it either gives people the right to participate in something or gives an obligation to the state to facilitate people’s participation in its affairs. The public is encouraged to participate in state affairs either as individuals or through their representatives as a collective. For example, section 15 gives individuals the right to participate in a religion of their choice, whereas section 19 gives people the right to participate in political affairs, both as individuals and as representatives of the electorate. One of the other instances where the word “participation” appears in the Constitution is in section 195, which requires public administration officers to respond to people’s needs and to encourage people as a collective to take part in policy making.¹¹⁵

¹¹² www.sadc.int adopted August 2008.

¹¹³ SADC Protocol on Gender and Development 2008, Article 13 (2) (a)-(d).

¹¹⁴ Article 4 of the SADC Protocol on Fisheries 2006.

¹¹⁵ S 195 (1) (e) of the Constitution of the Republic of South Africa, 1996.

In keeping with making South Africa a participatory democracy, the principles of accountability, responsiveness and openness underpin our Constitution. The term “public involvement” appears in five instances in the Constitution. The National Assembly, National Council of Provinces (NCOP) and Local Government are all required by the Constitution to facilitate public involvement in state affairs. Section 57 of the Constitution provides that the National Assembly must have due regard to public involvement in its internal arrangements, proceedings and procedures.¹¹⁶ Section 59 further obliges the National Assembly to facilitate public involvement in its legislative and other processes.

Section 70 requires the NCOP to also have due regard to public involvement in its internal arrangements, proceedings and procedures.¹¹⁷ Section 72 further mandates the NCOP to facilitate public involvement in its legislative and other processes.¹¹⁸ Furthermore, section 118 requires the Provincial Legislatures to facilitate public involvement in their legislative and other processes.¹¹⁹

Section 152 (1) (a) of the Constitution casts a duty on local governments to provide democratic and accountable government for local communities. The section also places obligations on local governments to “encourage the involvement of communities and community organisations in the matters of local government”; “ensure the provision of services to communities in a sustainable manner”; and to “promote social and economic development”.¹²⁰

Moreover, the duty of local governments to facilitate public involvement in its affairs is also legislated in terms of the *Municipal Systems Act*.¹²¹ The Act seeks to

‘provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities....and to provide for community participation’.¹²²

¹¹⁶ The Constitution of the Republic of South Africa, 1996.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid s152 (1) (e).

¹²¹ Act 32 of 2000.

Chapter 4 of the Act is dedicated to the responsibilities municipalities have with regards to facilitating community participation in the affairs of local government. According to section 16(1) of the Act, municipalities have to encourage and create conditions for local communities to participate in the affairs of the municipality. Section 16 further states that municipalities have a duty to facilitate public participation when making strategic decisions concerning the provision of basic services in terms of chapter 8 of the Act.¹²³ Chapter 8 of the Act details that basic services must:

- “(a) be equitable and accessible:
- (b) be provided in a manner that is conducive to-
 - (i) the prudent, economic, efficient and effective use of available resources; and
 - (ii) the improvement of standards of quality over time;
- (c) be financially sustainable;
- (d) be environmentally sustainable; and
- (e) be regularly reviewed with a view to upgrading, extension and improvement.”¹²⁴

Furthermore, municipalities are under an obligation to develop appropriate mechanisms, processes and procedures to enable local communities to participate in the affairs of their municipalities.¹²⁵ They are also obliged to communicate to communities the processes and procedures available for communities to take part in municipal affairs.¹²⁶

¹²² The Preamble of Act 32 of 2000.

¹²³ Ibid s16 (1) (v).

¹²⁴ S 73 (2) (a) –(e).

¹²⁵ S17 (2).

¹²⁶ S 21.

The Municipal Structures Act¹²⁷ (“the Structures Act”) also places an obligation on local governments through their Councils to develop mechanisms to consult with communities and community organisations in performing their functions and exercising their powers.¹²⁸ The Structures Act also places a duty on Municipal Councils to annually report on their processes for community involvement and develop mechanisms to engage the communities and community organisations in performing their functions.¹²⁹ The Executive Mayors also have an obligation in terms of the Structures Act to report on the involvement of communities and community organisations in the affairs of the municipality.¹³⁰

The duty to facilitate public participation in the realisation of socio-economic rights is also an issue of procedural fairness. The principle of procedural fairness finds its place in section 33 of the Constitution which places a duty of administrators to act in a manner that is lawful, reasonable and procedurally fair when making administrative decisions.¹³¹ Socio-economic rights implementation decisions are therefore administrative action as they are taken by organs of state exercising public power or private entities performing public functions.¹³² In line with the Constitution, procedural fairness in the implementation of socio-economic rights policies goes deeper than a tick-box exercise, it requires those charged with powers to make decisions to hear those who will be affected by their decisions and be responsive to them.

In the context of housing, the Housing Act¹³³ requires all spheres of government to “consult meaningfully with individuals and communities affected by housing development and facilitate active participation of all relevant stakeholders”.¹³⁴

¹²⁷ Act 117 of 1998.

¹²⁸ Section 19 (3).

¹²⁹ Section 44 (g).

¹³⁰ Section 56 (g).

¹³¹ Lillian Chenwi “Meaningful Engagement in the realisation of socio-economic rights: the South African experience” 135 Southern African Public Law, 2011 - journals.co.za.

¹³² Section 33 of the Constitution.

¹³³ Act 107 1997.

¹³⁴ Section 2 (1) (I) of the Housing Act 107 of 1997.

South African case law on public participation

Since the advent of the Constitution, courts have sought to give meaning to various notions of public involvement in state affairs. Public participation has been interpreted and understood to mean various things including representations, consultations and meaningful engagement. The section below will look at each of those concepts as they have been interpreted by our courts in detail.

3.4.1.1 Representations

This aspect of public participation often arises in the context of policy-making and legislative drafting. For example, the public may be invited to make representations in the form of a commentary on bills drafted by parliament prior to their enactment, or in a policy decision to be taken by an organ of state. A piece of legislation may require of the authorised decision maker in a particular context to invite the public to make representation on an issue prior to his or her final decision. Even though there is no exhaustive meaning of what representations entail, some guidance was given by the Western Cape High Court in *Beauvallon and others v the MEC of Education in the Western Cape and others* (“*Beauvallon*”).¹³⁵ The case dealt with the decision of the Member of the Executive Council for Basic Education in the Western Cape (“the MEC”) to close 27 schools in the Western Cape. The decision of the MEC was based on section 33 of the South African Schools Act (SASA),¹³⁶ which gives powers to an MEC to close public schools under certain circumstances.¹³⁷ The section, however, states that the MEC may not close a public school until s/he has notified the relevant School Governing Body (SGB) of his or her intentions. The SGB must then be afforded an opportunity to make representations in an endeavour to convince the MEC otherwise.¹³⁸ The MEC is also obliged to conduct public hearings with “affected communities” concerning his or her decision to close schools. The

¹³⁵ (22507/12) [2013] ZAWCHC 66 (19 March 2013).

¹³⁶ Act 84 of 1996.

¹³⁷ Act 84 of 1996.

¹³⁸ S 33 (2) (1) and (2).

communities are to be given an opportunity to make representations to the MEC during these hearings.¹³⁹

In *Beauvallon*, the applicants were school governing bodies of the schools that were to be closed. They argued that the consultations with communities that were conducted by the department of education's representatives as the hand of the MEC of education in the Western Cape were faulty. It was contended that the department did not adequately explain to the affected communities what factors would be taken into account to reach a decision on closure. Oblivious of the relevant factors, the communities who made representations spent time explaining how happy the learners were with the schools, the history of the schools and what the schools meant to their communities.¹⁴⁰

A majority of the schools' SGBs and communities affected by the proposed closure argued that the decision of the MEC was not in accordance with the framework of the SASA. They argued that they were not afforded an adequate opportunity, in terms of section 33 of SASA, to make representations to the relevant stakeholders. The applicants argued that the way the department's officials conducted the public hearings was inadequate because there had been no dialogue between these officials and those making representations on behalf of the communities.¹⁴¹

In the interim case of this matter, Desai J wrote the majority judgment and Davies J wrote the minority judgment. Desai J found that the public participation process, adopted by the MEC of Education in the Western Cape and his representatives, leading to the school closures, was inadequate.¹⁴² Davis J, on the other hand, held that because the MEC was only required to hear representations from the public and not enter into a debate, it was sufficient for the officials empowered by the MEC to hold the hearing on his behalf to note the representation without in anyway responding to them.

¹³⁹ S 33 (2) (c).

¹⁴⁰ *Beavallon* supra para 17.

¹⁴¹ *Ibid* para 10.

¹⁴² *Ibid* para 31.

The minority judgment in the case exemplifies the representations approach as the narrowest form of public participation, as officials are only expected to note the representations without entering into discussions. In contrast, the majority judgment requires an element of “meaningful engagement” when representations are made as the judges expected the department officials not only to note people’s concerns, but to respond to, and to address such concerns.

In *Doctors for Life v Speaker of the National Assembly and Others*, the Constitutional Court (“CC”) was called upon to decide what public participation entails in the law making process.¹⁴³ In the original application, the plaintiffs, Doctors for Life International, alleged that in passing certain health bills, the NCOP failed to hold public hearings and invite written submissions on the bills from the public.¹⁴⁴ The CC held that South Africa has traits of both a representative and a participatory democracy and, by implication, public participation has a significant role to play in the legislative process.¹⁴⁵ The Court held that the duty to facilitate public participation was material in law making and that the failure to comply with it may render the subsequent legislation unlawful.¹⁴⁶ The Court noted that public participation in the legislation drafting process is significant because it

‘encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling.’¹⁴⁷

Although the *Doctors for Life* and *Beuvallon* cases considered representations from different contexts, they both placed emphasis on the importance of public participation. From

¹⁴³ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC).

¹⁴⁴ *Ibid* para 2.

¹⁴⁵ *Ibid* para 135.

¹⁴⁶ *Ibid* 103.

¹⁴⁷ *Ibid* para 115.

both cases, one can infer that public participation is more than just a matter of procedure. Following the judgment in *Doctors for Life* therefore, when citizens have a right to make representations to the state, the state must afford them a real opportunity in light of the importance and the value of public participation.

Some methods of public participation have been found lacking in that they do not allow for people's voices to be heard clearly and effectively. At times, the process of public consultation has been too narrow and formalistic, rather than substantive. The Constitutional Court in *Doctors for Life* held that, in the law making process, Parliament may be flexible on the method it adopts for participation, provided that the public is afforded a reasonable meaningful opportunity to make representations.¹⁴⁸

The Constitutional Court further held that the assessment of whether or not reasonable steps were taken to facilitate public involvement will depend on a number of factors including the following:¹⁴⁹

- (a) the nature and the importance of the legislation and the intensity of its impact on the public,
- (b) practicalities, such as time and expense, which relate to the efficiency of the law-making process. It is important to note, however, that the court held that saving time and money does not justify the provision of inadequate opportunities for public participation,
- (c) the form of public involvement that Parliament deems appropriate.¹⁵⁰

3.4.1.2 Consultation

Consultation is a form of public participation in which the state seeks inputs from the public prior to making a decision on particular issues. There are many instances where the state may be required to consult with the public before making a decision. For example, in keeping with their

¹⁴⁸ Ibid para 125.

¹⁴⁹ Ibid para 128.

¹⁵⁰ Ibid.

obligations in Chapter 4 of the Municipal Systems Act, municipalities have at times called communities to consultations prior to making policy decisions. Chapter 3 below deals with two instances where municipalities have convened such consultations.

An example of a consultation process is that cited by Wandisa Phama and Palesa Madi involving the erection of single toilets in each household in the Makhaza informal settlement in Khayelitsha, a township in Cape Town.¹⁵¹ The City of Cape Town called people to a meeting and then informed them that it will build toilets for them. The City, however, placed the obligation of enclosing the toilets on the community itself as they were to be erected without structures to enclose them. As a result of the method of participation chosen by the City, the meeting was simply a space for the community members to be informed of what was to happen. There was no room for their views. As a result, many poor households in that community found themselves with open toilets they were consulted on, but could never enclose.

The challenge with consultations is that they become procedural participation and are devoid of any substance. This is because communities are not given adequate opportunities to prepare for the meetings to raise relevant questions. Sometimes, communities do not know the language in which they are engaged by the state and the formal processes of consultation. The socio-economic inequalities in South Africa also mean that in low income communities, not everyone can attend consultations on development as they may be preoccupied with finding basic necessities for their families.. Furthermore, consultation spaces of public participation tend to be spaces for the state to comply with formalities rather than to hear from the people and take decisions which show regard to the people's concerns.

3.4.1.3 Meaningful Engagement

Courts have developed fascinating discourse on the concept of meaningful engagement as a standard by which to assess meaningful participation of those who are affected by socio-economic decisions of the state. The Constitutional Court started developing jurisprudence

¹⁵¹ Wandisa Phama and Palesa Madi "The Role of Civil Society Organisations and Chapter 9 Institutions in Implementing South Africa's Constitution" in Charles Fombad (ed) *The Implementation of Modern African Constitutions: Challenges and Prospects*; Pretoria University Law Press 2016 (137-155).

on meaningful engagement between municipalities and communities affected by socio-economic decisions taken by the state in *Grootboom*.¹⁵² This was a case involving an eviction of children and adults who had occupied privately owned land and were sleeping on sports fields. The community approached the Court to decide on the ambit of the right to housing in the context of eviction.¹⁵³ The Court held that the state was required to act in a manner that is reasonable in its efforts to progressively realise the right to housing. It found that for a programme of the state dealing with the progressive realisation of socio-economic rights to be considered reasonable, it was important for the state to engage with people who were going through an eviction as soon as it became aware of their illegal occupation of the land. In this way, the court expressed the need for the state to engage communities from the onset when decisions which are going to affect such communities, especially the most vulnerable, are to be taken.¹⁵⁴

In *Kayalami*¹⁵⁵ the Constitutional Court explained that meaningful engagement also entails a consideration of good governance in the decisions that are to be taken by the state. It held that good governance requires, among other things, finding appropriate methods to inform those who will be affected by state decisions and engage them in discussions and planning of its projects at an early stage.¹⁵⁶

In *Port Elizabeth Municipality*,¹⁵⁷ the Constitutional Court further addressed the issue of engagement between the state and the communities in the realisation of the right to housing in terms of section 26 of the Constitution. The court had to resolve an eviction of a community from an undeveloped piece of land owned by the state in terms of section 6 of the Prevention of Illegal Evictions from, and Unlawful Occupation of, Land Act (PEI).¹⁵⁸ It highlighted the importance of engagement not only as a tool to reach a settlement between the state and the

¹⁵² *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

¹⁵³ *Ibid.*

¹⁵⁴ *Chenwi* op cit note 131 at 188.

¹⁵⁵ *Minister of Public Works v Kayalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

¹⁵⁶ *Ibid* para 111.

¹⁵⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

¹⁵⁸ Act 19 of 1998.

community, but also the value it brings in the process that leads to the outcome of a decision.¹⁵⁹ The Court observed that there were many benefits to facilitating engagement between the state and the affected communities prior to making a decision:

“Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.”¹⁶⁰

In *Joe Slovo*, the Constitutional Court found that even though parties do not have to agree with each other on every issue, what was required in an engagement process was for them to engage in good faith, reasonableness and willingness from both sides to listen and understand each other’s concerns.¹⁶¹

The *Olivia Road*¹⁶² case presented a further opportunity for the Constitutional Court to develop the concept of meaningful engagement as a remedy in eviction matters and the Court indeed developed jurisprudence on how meaningful engagement could be used as a remedy in eviction cases.¹⁶³ The case was in the form of an appeal by the applicants against the decision of the Supreme Court of Appeal (“SCA”). The applicants were occupiers of old buildings in the inner city of Johannesburg. The City served an eviction notice on the occupiers because the buildings they occupied were old and a health risk. To effect the eviction, the City could evoke the provisions of the National Building Regulations and Building Standards Act¹⁶⁴ which allows

¹⁵⁹ *PE Municipality* supra note 157 para 46.

¹⁶⁰ *Ibid* para 42.

¹⁶¹ *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes* 2009 9 BCRL 847 (CC) Para 378.

¹⁶² *Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

¹⁶³ *Chenwi* op cit 131.

¹⁶⁴ Act 103 of 1977.

evictions when the City deemed it necessary for the safety of the occupiers.¹⁶⁵ One of the arguments raised by the occupiers in their objection to the eviction was that they were not afforded a hearing before the decision to evict them was made.

After listening to the appeal application, the Constitutional Court issued an interim order that required the City and the applicants to engage meaningfully with each other outside of the court process to identify short-term measures that could be taken to improve the living conditions of the occupiers.¹⁶⁶ The Court developed some of the key elements of meaningful engagement. It held that “meaningful engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully to reach certain objectives”.¹⁶⁷ The Court found that the responsibility of the City to engage meaningfully with those who were to be affected by an eviction and consequently be rendered homeless was as a result of various obligations the City has towards the occupants. Among some of the constitutional obligations of the City the Court cited the duty of the City to “provide services to communities in a sustainable manner”,¹⁶⁸ “promote social and economic development”,¹⁶⁹ and “encourage the involvement of communities and community organisations in matters of local government”.¹⁷⁰ The Court went on to hold that the duty of the City to engage people who were about to be rendered homeless was also squarely grounded in section 26(2) of the Constitution.¹⁷¹ It noted that this provision requires the municipality’s response in an engagement process to be reasonable.¹⁷² The Constitutional Court held further that whenever adverse decisions that will affect people are to be made, there is a great need for the state and people to engage. The Court held that the larger the number of people to be adversely affected by the decision of the City, the greater the need for structured and considerable meaningful engagement.¹⁷³ The Court added that meaningful engagement must precede litigation and that only after there has been a break-down should litigation follow.

¹⁶⁵ Ibid section 12 (4) (b).

¹⁶⁶ Ibid para 5.

¹⁶⁷ Ibid para 14.

¹⁶⁸ Section 152(1)(b) para 16 of Olivia Roads.

¹⁶⁹ Section 152(1)(c) para 16 of Olivia Roads.

¹⁷⁰ Section 152(1)(e) para 16 of Olivia Roads.

¹⁷¹ Ibid para 17.

¹⁷² Ibid para 18.

¹⁷³ Ibid para 19.

Sandra Liebenberg has argued that drawing knowledge from cases such as *Olivia Road*, ‘meaningful engagement’ is something that people and the state must do in “good faith, reasonably and with transparency”.¹⁷⁴ Meaningful engagement therefore means that before the state makes a decision, it must approach the affected people to discuss its plans and the reasons behind them. This will afford the people an opportunity to advise the state on whether there were less restrictive means to reach the state’s goal without overly invading upon their rights. Thus, meaningful engagement conducted in good faith will also mean that if communities have service delivery challenges, they can call on their municipalities to come and listen to their concerns. On their part, municipalities will attend to such calls, listen to the communities and craft solutions with them.

Lillian Chenwi and Kate Tissington have defined meaningful engagement as a form of public participation which happens when communities and the government talk and listen to each other and when they try to understand each other’s perspective so that they can reach a particular outcome.¹⁷⁵ They further explain that meaningful engagement is a neutral space where people and the state can discuss and shape options and solutions to complex issues.¹⁷⁶ For such engagement to be meaningful, it must enable individuals and communities to be treated as partners in the decision-making process.¹⁷⁷ In an ideal situation, meaningful engagement should take place at the beginning of any process that may result in litigation.¹⁷⁸ This kind of engagement is to be distinguished from one ordered by a court in the process of litigation as was done in *Olivia Roads*.¹⁷⁹ Chenwi rightly observes that, while meaningful engagement which takes place prior to litigation has benefits, its biggest challenge is that when people engage with the state on socio-economic rights issues prior to any litigation, parameters are not drawn in terms of their rights and the state’s obligations. This can result in the engagement not being meaningful as often most people who are engaging with the state will be poor and vulnerable.

¹⁷⁴ Sandra Liebenberg ‘Possibilities and Pitfalls of ‘Meaningful Engagement’ (2012) 12 African Human Rights Law Journal at 16.

¹⁷⁵ Lillian Chenwi & Kate Tissington ‘Engaging meaningfully with the government on Socio economic right: a focus on housing’ March 2010 Community Law Centre (UWC) at 9.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Chenwi op cit note 131 at 152.

¹⁷⁹ Ibid.

Without rights and responsibilities being established from the onset, engagement can become a tick box exercise as the power imbalances between the state and people would not have changed.

The fact that engagement is likely not to be effective because the state may not engage meaningfully with communities if the community's rights and the state's responsibilities have not yet been clearly defined by the courts illustrates weaknesses within the politics of democracy. If democracy means governing with the will of the people, the system should incorporate the people's power to use their voices to be heard and demand a responsive behaviour from the state.

When applied properly, the meaningful engagement approach is a progressive form of public participation in the context of the realisation of socio-economic rights and service delivery. Meaningful engagement differs from consultation in the sense that it requires parties to engage each other in good faith, whereas consultations can be a one-way process. Nonetheless, when assessing whether an engagement with the state has been meaningful, it is important to be aware of how any form of public participation in state affairs comes with power dynamics that may be difficult for communities to navigate. Unlike the idea proposed by Chenwi in Tissington, there is no neutral space in any public participation process. From theories of power explained above, it is clear that there will always be power politics at play in any engagement. The distinguishing factor between meaningful engagement and other types of public participation is that it actually allows for a space in which the state can “power with” communities to bring about the realisation of socio-economic rights.¹⁸⁰

Taken together, all forms of public participation listed above as a framework in which South Africa facilitate public participation in state affairs, either in law-making, conflict resolution or as a fulfilment of the requirements of the law, the theories of power and space discussed in Chapter I above become very important in understanding what each of those notions of public participation actually mean. This chapter dealt extensively with the legal framework of public participation in South Africa and how it has been interpreted by courts and

¹⁸⁰ Gaventa op cit note 75.

academic writers. It has discussed three forms of public participation advanced in in our jurisprudence: consultations, representations and meaningful engagement. For the realisation of socio-economic rights, meaningful engagement is the standard that our Constitution requires. Meaningful engagement requires more responsiveness from the state as a two-way process than other forms of public participation. Unlike consultations and representations which may be spaces of “non-participation” for those affected by the decision in socio-economic right cases, meaningful engagement forces the state to deflate some of its power to create a space where it can engage with communities almost on an equal footing. Such engagement, if conducted properly as envisaged by the courts, could allow for a space in which communities, of their own accord, may approach their municipalities to raise their concerns with service delivery. This can be done in ways in which consultation and representations cannot accommodate since these forms of participation always need to be initiated by the state. The concept of meaningful engagement is in keeping with our legislative framework to public participation.

The next chapter will examine two case studies in which socio-economic rights complaints were lodged with the South African Human Rights Commission (SAHRC). These case studies will be used to explore why institutionalised models of public participation in South Africa are ineffective as mechanisms to ensure that socio-economic rights are realised. This analysis will be done through employing Gaventa’s theory of power as a lense to assess how power politics cripple institutionalised spaces of public participation.

CHAPTER IV

THE SHORTCOMINGS OF INSTITUTIONALISED PUBLIC PARTICIPATION IN REALISING SOCIO-ECONOMIC RIGHTS

Introduction

The previous chapter dealt with the legal status of public participation in South Africa. It argued that the Constitution recognises public participation as a pillar of our democracy and as a necessary enabling right for citizens to hold the state accountable, responsive and transparent. Courts have also emphasised the need for the state and the people to meaningfully engage on matters that affect those people's lives are to be decided. As the Constitutional Court held in *Doctors for Life*,¹⁸¹ people feel they are included when their input is sought before decisions affecting them are made. This is consonant with South Africa's international obligations to facilitate public participation in state affairs.

In practice, however, South Africa is currently going through a crisis caused by a breakdown of communication between the state and its citizens. In the context of socio-economic rights, the government has often failed to facilitate public involvement in state affairs when crucial matters affecting people fall to be decided. At times, even when the government has tried to engage people prior to making decisions, such efforts have not only appeared to be inadequate but also seem to have been done only for the purposes of compliance with the letter of the law and not its spirit. As exemplified further below, many engagements on socio-economic rights issues have resembled the manipulation typology of public participation for the mere purpose of legitimising decisions that have already been taken.

The government has often reached out to communities when service delivery policies are to be implemented. However, in certain instances when the policies are implemented, it

¹⁸¹ *Doctor for life international* supra note 143.

becomes apparent that the people who were consulted did not have a space to contribute meaningfully in the conversation with the state. The reason for this could be the fact that, the “invited spaces” in those engagements have been opened without any interest from the state towards balancing the power dynamics between the state to the people.

This communication breakdown is better illustrated through two sanitation complaints that were lodged with the Human Rights Commission (SAHRC) in 2010.¹⁸² One complaint was lodged in Cape Town and the other in Bloemfontein. These case studies depict the flaws in many of South African public participation methods employed when addressing socio-economic rights concerns. They show an image of how the state uses the lowest methods of public participation to manipulate people into believing that they are taking part in decisions concerning their lives, whereas their contribution has no impact. The root cause of the flaws in the described participation models is the power imbalance between the state and its people in those engagement spaces. Without the acknowledgement of power politics in public participation spaces, and how citizens who engage with the state are perceived as “users” of services as opposed to rights bearers, it is inevitable that one would find the lowest forms of public participation.

The ignorance of the role played by power in engagements between the state and citizens has meant that communities have engaged with the state in a disempowered position. This forces them to make concessions which have adverse impacts on their lives. Often in spaces of participation where communities are perceived as users who cannot direct the engagement process and drive its agenda, the power imbalance is likely to be internalised, creating a situation in which hidden power cripples the voice of the communities in those engagements. The examples below explain this concept of power in public participation.

¹⁸² I have recently used these case studies elsewhere. See Wandisa Phama and Palesa Madi “*The Role of Civil Society Organisation and Chapter 9 Institutions in Implementing South Africa’s Constitution*” *The Implementation of Modern African Constitutions: Challenges and Prospects*; Pretoria University Law Press 2016 (137-155).

Participation and Power in practice

4.1 Makhaza toilet complaint lodged with the SAHRC: 2010

A complaint was lodged with the SAHRC by the African National Congress Youth League (ANCYL) in the Dullah Omar region in the Western Cape. The complaint was lodged after the City of Cape Town erected open-flush toilets in the impoverished community of Makhaza, Khayelitsha. In 2005, the City of Cape Town undertook a decision to develop an informal settlement in Khayelitsha known as Silvertown in terms of the *Upgrading of Informal Settlements Programme* (UISP).¹⁸³ However, the Silvertown area was not big enough to accommodate the members of the community who had to relocate pending the development. The City then decided to use two under-developed areas, Makhaza and Town 2, to relocate some of the residents of Silvertown during the development programme. These areas were then also included in the development planned for Silvertown. Pursuant to the planned upgrade, the City decided to install communal toilets in the three areas whereby one toilet would be used by five households (1:5 ratios). 'These communal toilets consisted of a concrete slab on which the toilet was built with the cistern and water pipes and this was enclosed with a pre-cast concrete structure',¹⁸⁴

This decision was taken by the City without any evidence of meaningful public participation by the community. The City treated the residents as mere users of basic services, which is a form of citizenship that leaves communities with little power to question the choices regarding service delivery the state makes for them.

In 2007, the City began the installation of the communal toilets. It built 63 communal toilets for the residents of Makhaza using a ratio of 1 toilet per 5 households.¹⁸⁵ The community expressed its unhappiness with the communal toilets. The toilets were in an unhygienic state

¹⁸³ *African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents v City of Cape Town*, South African Human Rights Commission Report: WC/2010/0029.

¹⁸⁴ *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011].

¹⁸⁵ *Ibid* para 17.

and, because they were shared, it became difficult for people to trace who last used the toilets and when. The community then demanded a toilet for each household, and as a result the municipality stopped the construction of the communal toilets.¹⁸⁶

It is alleged that in 2007 the City had a meeting with the community and various issues were discussed, including the demands of the community of a toilet per household. The City allegedly informed the community that the City would build one toilet per household and that the community would bear the costs of enclosing the toilets.¹⁸⁷ It is not clear how the community was invited to participate in the decision leading to the construction of the unenclosed toilets. The City, however, believed that the community had agreed to the self-enclosure of the toilets. This is of course ignorant of the fact that people who are poor and vulnerable are powerless or not cognisant of their power in engagements with the state and therefore will agree to anything which seems like it may assist them. This is however not too surprising in an engagement process. Because of the power municipalities have over their residents, and if their residents are used to being treated with a lack of responsiveness, people tend to internalise their treatment and their disempowered positions. Unsurprisingly, they are likely to take whatever they can get from the state.¹⁸⁸

Four years after the said meeting took place; the City installed 225 unenclosed toilets in Makhaza.

'The unenclosed toilets consisted of a concrete slab for the toilet to stand on with the cistern and a water pipe that was not affixed to any walls. The toilets were completely open and in full view of every person in the community, and mostly situated close to the road.'¹⁸⁹

To use the unenclosed toilets, residents had to cover themselves with blankets since the toilets were in full view of the public.¹⁹⁰ The nature of the toilets proved to be a big risk to

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Gaventa op cit note 75.

¹⁸⁹ *Beja case supra 184 para 19.*

people's health and safety. Nonetheless, the City made no effort to engage the community to evaluate the appropriateness of the toilets. The toilets were far from some people's homes. In April 2010, one of the residents, a 76 year old woman, Mrs Beja, used one of the unenclosed toilets to relieve herself under a blanket. Once she relieved herself she got up and started walking towards her shack and on the way she was attacked, stabbed and sustained injuries that required medical treatment.¹⁹¹ This incident prompted a number of residents to cover some of the toilets with whatever mixed materials they could find, as they could not afford proper enclosures. In 2010 a total of 225 of the unenclosed toilets built by the City were enclosed by the residents in this manner but 55 toilets still remained unenclosed.¹⁹²

In January 2010, after consulting with the residents of Makhaza, the ANCYL in the Dullah Omar Region in Makhaza lodged a complaint with the SAHRC on behalf of the residents who were forced to use the 55 unenclosed toilets.¹⁹³ In their complaint, the Youth League alleged that the City violated the residents' rights to human dignity and their rights to privacy as entrenched in sections 10 and 14 of the Constitution respectively.¹⁹⁴

Soon after receiving the complaint, the SAHRC began its investigation and it later conducted an inspection in Makhaza.¹⁹⁵ It then scheduled a mediation session between the ANCYL and the City to resolve the situation. However, the mediation broke down irretrievably. Meanwhile, due to the wide media coverage of the issue, the City attempted to enclose the 55 unenclosed toilets with corrugated iron sheets. However, after enclosing only 26 toilets, the corrugated iron sheets were immediately removed by angry unidentified people in Makhaza.¹⁹⁶ Thereafter, on 24 May 2010, the Mayor ordered the complete removal of the toilets. This forced

¹⁹⁰ Ibid.

¹⁹¹ Ibid para 23.

¹⁹² Ibid para 20.

¹⁹³ *African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents v City of Cape Town, South African Human Rights Commission Report: WC/2010/0029.*

¹⁹⁴ Section 10 of the Constitution of South Africa states that 'everyone has inherent dignity and the right to have the dignity respected and protected' section 14 states that 'everyone has the right to privacy, which includes the right not to have; their home or person searched, their property searched, their possessions seized or the privacy of their communication infringed'.

¹⁹⁵ *African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents v City of Cape Town, South African Human Rights Commission Report: WC/2010/0029* at page 3.

¹⁹⁶ Ibid at page 3.

the residents to resort back to communal toilets, which at that point were in an appalling and sickening state.¹⁹⁷

Because the mediation between the ANCYL and the City was unsuccessful, the SAHRC released its finding on the issue on 4 June 2010. It found that even though the City's decision to provide toilets for the residents in each household was reasonable and commendable, its implementation was not.¹⁹⁸ Given that the residents had to use the unenclosed toilets for almost three years, the SAHRC regarded this as proof that the City did not take into account the privacy, dignity, safety of vulnerable groups including, girls, women and those who could not afford to enclose the toilets themselves.¹⁹⁹ The SAHRC further noted that when dealing with vulnerable groups, proper consultation would have been crucial. It observed that in this instance, there had clearly been no such consultation.²⁰⁰ The SAHRC stressed that because there was no proper channel for information sharing with the residents, the one meeting relied upon by the City as a consultation process was inadequate.²⁰¹ The SAHRC therefore concluded that indeed the rights of the residents to dignity and privacy were violated.

It became apparent in the finding of the SAHRC that the typology of public participation adopted by the City was inadequate. The participation was inadequate because even though there may have been a meeting to discuss the toilets, the meeting did not guarantee that the people's voices would be heard and their concerns addressed. It is difficult to argue that the voices of the community members were heard in that participation as people who have an understanding of their power in a participation space will not ordinarily contract into something that will take away their basic human rights such as dignity in the pursuit of a material (good?). Nonetheless, even if people contracted out of their basic human rights, public engagement for socio-economic rights should not force people into that position.

¹⁹⁷ Ibid at page 3.

¹⁹⁸ Ibid at page 7.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid para 6.2.2

When the City appealed the decision of the SAHRC in an internal appeal process, the residents lodged an application with the High Court (“the Beja case”).²⁰² In the application the residents asked for a declaratory order that by providing open toilets to the residents, the City was violating their constitutional rights to equality, dignity, privacy and security of person.²⁰³ They also asked the Court to order the City to re-install all the toilets that were removed, but with adequate enclosures.

The City brought a counter-claim in the High Court. It alleged that the decision to install unenclosed toilets in the Silvertown project was based on an agreement entered into by the City and the community in a meeting held in 2009.²⁰⁴ The City alleged that on 27 November 2007 about 60 of the 6 000 residents of Makhaza attended a meeting where they expressed their dissatisfaction with the communal toilets and the City promised to build them single flush toilets, but explained to the community that they will bear the costs of closing the toilets. The City further argued that since no one objected to the installation of the unenclosed toilets at that meeting, it understood that there was an agreement between the City and the community.²⁰⁵ The community denied the existence of the agreement and wanted the court to declare the alleged agreement invalid.

The City also argued that to ensure community participation, it had hired community liaison officers (“CLOs”).²⁰⁶ Nonetheless, there were no records of the work undertaken by the CLOs to facilitate proper communication between the City and the people. According to the judgment in the case, the subcontractor once tried to have a meeting with the community through the CLOs, but there was no evidence whether there were any CLOs in that meeting.²⁰⁷ Minutes of a subsequent meeting between the subcontractor and the CLOs showed that the site of the toilets was discussed and nothing was noted about the community enclosing their own toilets.²⁰⁸ The City also alleged that it collected “happy letters” from the community confirming

²⁰² Beja supra 184 at 27.

²⁰³ Ibid para 7.1

²⁰⁴ Ibid para 77.

²⁰⁵ Ibid para 81.

²⁰⁶ Ibid para 82.

²⁰⁷ Ibid.

²⁰⁸ Ibid para 84.

that they wanted the open flush toilets, but there were no records as to the nature of the “happy letters” and the information the City gathered from them.²⁰⁹ The City therefore produced no tangible evidence of meaningful engagement with the community prior to its decision to construct the unenclosed toilets.

The Court found that the City had indeed violated fundamental constitutional rights of the community.²¹⁰ It further found the alleged agreement invalid as its existence was not established, and even if it was, people could not waive their rights to dignity under a programme that was not carried out in the spirit of the Constitution.²¹¹ The Court also ordered the City to enclose all the 1316 toilets which were part of the Silvertown project.²¹²

There are a number of issues with the manner in which the City of Cape Town conducted public participation in the *Beja* case. These issues are also common to many other communities faced with socio-economic rights issues. Firstly, a lot of what went wrong in the public participation process in Beja had a lot to do with the idea of citizenship that the City and the community perceived about the community. As explained in chapter two, citizenship can be understood to perceive people as “users”, “choosers” and “rights bearers”.²¹³ Users are citizens who just use services of the state with no control over the nature of the services and they must either accept the services or get no services at all.²¹⁴ Choosers have an option of choosing the services they want while right-bearers can choose the services they want and hold the state accountable for not providing them.²¹⁵

From these typologies of citizenship, it is evident that the City of Cape Town treated the community in the *Beja* case as citizens who were just users of services. In the public participation process, they were perceived just as people who had to accept the open toilets or use the communal toilets that were no longer fit for human use. To be given a choice between the only services that seem better than one’s current deplorable services is not exercising choice

²⁰⁹ Ibid.

²¹⁰ Ibid para 192.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Cornwall and Gaventia op cit note 65.

²¹⁴ Ibid.

²¹⁵ Ibid.

in the services that one needs. The City knew that the community were poor people. It knew that many of them could not afford to close the open toilets, if they could; they would not be living in an informal settlement with their houses made up of different materials from wood to corrugated iron.

What is also notable about the Beja case is the manner in which the community did not contest the reasonableness of the City of Cape Town's proposal to give them open plan toilets. There are a number of reasons that can be inferred from the lack of objections by the community. First, poor communities in South Africa who rely on the state for the provision of basic services are used to the government's lack of responsiveness. Hence, when a City suddenly reaches out to them, they take whatever treatment they can get and internalise the idea of just being users of services. It is because communities internalise the notion of being users of basic services that municipalities can call for public participation as a mere formality and end up providing unreasonable or unacceptable services to communities.

This unfortunate internalisation of citizens as just users of services provided by the state entails that public participation fora are tainted with "*invisible power*".²¹⁶ It is the exclusion in the minds of the citizens which makes them accept their treatment as outsiders in deliberations with the state as though that is in accordance with the rules of the game. In creating "empty invited spaces" for public participation, the state relies on invisible power to provide substandard services to communities which are below what they are entitled to and even contrary to the obligations the state may have to provide those services. It is the people's sense of disempowerment in Beja that the City of Cape Town exploited to provide services that were against what was envisaged in the Constitution.²¹⁷

The Constitution sets the standard of rights-bearers when it comes to the provision of basic services. A type of citizenship that is contrary to what the Constitution provides opens up communities to vulnerability that is then exploited by the state. This exploitation manifests in

²¹⁶ Gaventa op cit note 75.

²¹⁷ Section 27 of the Constitution of the Republic of South Africa, 1996.

the state using its power over communities and operating in a space where public participation does not lead to responsiveness in the provision of services.

The *Beja* case shows that public participation is a matter of power. It can be the power over the community the state may have to manipulate their internalised sense of exclusion to justify the absence of meaningful engagement in their invited public participation spaces. Although the space may have looked like participation it was in actual fact a spaces of “non-participation”.

4.2 Free State complaint lodged with the SAHRC in Free State

In September 2010, a complaint was lodged with the SAHRC by the executive director of the Democratic Alliance (“complainant”) on behalf of the residents of Rammulotsi Township, Viljoenskroon.²¹⁸ The facts are similar to those of the Cape Town complaint. The complaint was lodged after the municipality of Rammulotsi had erected unenclosed flush toilets in each house in the area. The complainant argued that the SAHRC should make a finding in light of the *Beja* SAHRC. The complainant asked the SAHRC to declare that the Rammulotsi municipality had violated the rights of the community to dignity, privacy and a clean environment.²¹⁹ As in *Beja*, there was no evidence of any form of community participation in the decision of the municipality to install the toilets, except for one meeting the municipality allegedly had with the community.²²⁰

The SAHRC found that in planning and implementing a project like the one that the municipality undertook in this case, community participation was necessary from the planning until the implementation phase of the project.²²¹ It held that the municipality would have avoided wasteful expenditure if it had meaningfully engaged the community in the process as that would have given it a chance to become even more familiar with the needs of the

²¹⁸ Ibid para 2.1.

²¹⁹ Ibid para 2.2.

²²⁰ Ibid para 10.2.

²²¹ Ibid at 10.3.

community.²²² The SAHRC found that in the absence of consultation, the municipality had failed to follow the legal framework to which it had to adhere in conducting the project and that the municipality had violated the community's rights to dignity, privacy and a clean environment.²²³

The Cape Town and Free State complaints have apparent similarities. What is more similar about them is the outcomes of the decisions of the two municipalities. Though the decisions were taken in different provinces, the violation of basic human rights is the same. Furthermore, even though the two municipalities alleged that they engaged with the communities in deciding on the policies, it is apparent from the decisions reached to install the unenclosed toilets that such engagements did not give due regard to the agency of the residents of the two communities, nor to the fact that many people would not be able to enclose the toilets. At no point did the communities raise the health and safety concerns about the proposed toilets. In the Cape Town complaint it can be argued that one possible reason why the community raised no objection to the installation of the toilets is the fact that the only toilets the community had in the alternative were the sickening communal toilets. Therefore the unenclosed toilets may have been seen as a lesser insult to dignity though in fact when viewed in isolation they were a gross one.

Neither municipality made a concerted effort to assess the needs of the communities. In the Free State, besides the one meeting mentioned, the municipality failed to check whether or not the community had enclosed the toilets. Both municipalities made decisions that negatively affected the communities and violated their rights without any evidence of the communities' acceptance of the decision. The City of Cape Town tried to rely on less than 1% of the population of Makhaza to argue that the community accepted the decision. Such outcomes from the two municipalities were unreasonable and a breach of their constitutional obligations. The breach of basic human rights proves that having spaces for public participation which do not take into account the role of power in those spaces does little to empower communities. If anything, this typology of public participation only further marginalises the communities.

²²² Ibid.

²²³ Ibid 14.

It is worth noting, in light of the abovementioned complaints, that the role of the public as understood by municipalities is very minimal when policies that will affect communities are made and implemented. Public participation and what amounts to meaningful engagement often becomes what the organ of state understands it to be. As evidenced by the two complaints, the role of the communities is underplayed in the process and the outcomes in such instances are often a clear violation to human rights.

Significantly, it is striking that once the City of Cape Town had erected the open toilets in Makhaza, the Municipality of Rammulotsi did the same. This indicates that the acceptable standard of public participation in the realisation of socio-economic rights is a power contestation that must be guarded as “non-participation” in one area may mean the same in another.

The Chapter below evaluates the kind of public participation that promises to be meaningful in popular spaces that are organised by communities to engage with municipalities and what works as a bearer for meaningful participation in those spaces. The section will use a case study to put forward that evaluation.

CHAPTER V

THE CREATION OF SPACES OF PARTICIPATION BY COMMUNITIES AS AN ALTERNATIVE TO STATE CREATED PUBLIC PARTICIPATION- THE GUGULETHU CASE STUDY

Introduction

The pitfalls of state-created public participation spaces have not gone unnoticed by South African communities who lack access to basic services. In fact, these communities often try to create public participation spaces to engage their municipalities in providing basic services. It is not the lack of agency by communities in creating public participation spaces that creates situations like in the two cases studies of the Makhaza and Rammulotsi community as outlined above; it is the responses of municipalities that make public participation spaces ineffective. It is the treatment of communities as mere “*users*” of basic services that becomes a limitation to effective participation in state affairs that otherwise could have the potential of creating understanding between the state and communities in the provision of basic services.

The case study below documents an experience of a community in an informal settlement in Cape Town which tried to challenge its treatment by the City of Cape Town as mere “*users*” of basic services to demand a responsive behaviour from the City. The community demanded to be treated as rights-bearers who could also create the space for their participation in how basic services ought to be provided by the city. The community sought to deflate the power the City had over them in the provision of basic services. Nonetheless, the deflation of power from the state does not always mean a neutral space for engagement.

5.1 The Gugulethu Sanitation Crisis

In 2013, a community in Gugulethu comprising three informal settlements had a sanitation crisis. The community was made up of the Barcelona, Kanana and Europe informal settlements in ward 40 of the City of Cape Town. The community is serviced through the bucket system now known as “chemical toilets” for toilet facilities. The toilets are in the form of a plastic container that is placed in a four-wall structure. The container has to be removed to empty the human waste to maintain hygiene. The City of Cape Town as the municipality that the community falls under had the responsibility to service these toilets. The City outsourced that responsibility to a private company, Sanicare,²²⁴ which in turn hired workers to service the toilets once a week.

In February 2013, the workers went on strike over a wage dispute with the company.²²⁵ Their strike resulted in the toilets not being serviced as regularly as they used to be. Sometimes two weeks would pass without being serviced. The strike greatly affected the three communities, more so because they were all dense informal settlements built on a wetland area that was previously used as a waste pit by the City. The failure to clean the chemical toilets posed a hazard to the community as they would overflow with human waste that would at times make its way into people’s homes. The toilets thus created an unhealthy and intolerable situation for the residents.²²⁶

The community was organised in a community forum that serves as a leadership structure for the community. For the purposes of trying to resolve the sanitation crisis, the community organised themselves into a structure called Nxantathu, which they used to communicate with the City of Cape Town.

Through the community leadership structure, the community reported their challenges with the sanitation crisis as a result of the strike. This is despite the fact that the community and the leadership committee were in support of the strike for the workers’ decent wage. Some of

²²⁴ GroudUp “Battle over Barcelona’s Buckets” 29 May 201: <http://www.groundup.org.za/article/battle-over-barcelonas-buckets> (14 August 2017).

²²⁵ Ibid.

²²⁶ Ibid.

the workers were members of the community.²²⁷ From April of 2013, the community wrote a number of letters to the office of the Mayor of Cape Town, Ms Patricia De Lille, as well as the then Member of the Mayoral committee (“MMC”) for Water and Sanitation, Mr. Sonnenberg. According to the leadership of the community, the community asked the City to intervene to alleviate the crisis by servicing the toilets pending the duration of the strike. This request was met with deafening silence. When there were no responses from the City of Cape Town, the community, through the leadership committee, asked for meetings with the MMC for water and sanitation and the Mayor. These requests were also met with an irresponsible attitude.

After several weeks, the City employed casual workers to service the toilets. However, these efforts were erratic and thus did not entirely alleviate the community’s plight. Consequently the community persisted to demand meetings with the Mayor and the MMC. On 2 May 2013, the community leaders were eventually called to a meeting by the City. The MMC was present at the meeting but the Mayor was absent. At the meeting, the community leaders requested that:

- (a) They should be informed on which days the City workers would come;
- (b) The workers should service the toilets at night as it was the norm, to protect the children from contracting any illnesses from the cleaning process as the community was dense;
- (c) They be informed as to what the City was doing to resolve the workers’ strike; and
- (d) The City should inspect the toilets and the living condition of the community,

The City stated that it could not respond to the demands of the community immediately and that it would escalate the issue to the Mayor and revert to the community. It never did.²²⁸

As the strike continued, the City workers who serviced the toilets came less frequently to the settlement(s). The dirt in the toilets exacerbated the dire unhygienic conditions in the community. There was no response from the City despite countless efforts by the community. The community then decided to embark on a service delivery strike for improved sanitation. The

²²⁷ Ibid.

²²⁸ Ibid.

strike was also joined by the workers who wanted the City to intervene in their negotiations with Sanicare.

The protests were organised in the early hours of the morning from about 3am. They were conducted on the N2 highway, one of Cape Town's busiest roads.²²⁹ The protests continued over a period of time with no response from the City on the issues. Instead, the only word from the Mayor was to label the protestors as hooligans and troublemakers.

With the lack of response from the City, the community decided to embark on a different kind of strike. They took the full chemical toilets, boarded the train, and went to the City Centre. Upon their arrival, they camped outside the Mayor's office waiting for her to address them on the way forward. The Mayor did not go out of her office to address the community. Instead, police arrived and arrested the protesters. They were later charged with a number of offences, including the violation of the Health Care Act²³⁰ for putting the public at a health risk.

At no point did the criminal justice system's response to the community's actions – which response included the laying of charges against the community members – consider how the Mayor, the MMC and the officials of the City put the community at a health risk by not servicing the toilets. The community members had a pending trial against them for taking part in the protest. This meant that, over and above merely being poor and asking for services to be provided, the community members were to suffer the consequences of the criminal justice system.

5.2 The Community Seeks Legal Advice

Meanwhile the conditions in the township continued to deteriorate and eventually the community sought legal advice from the author on how to proceed with the matter.²³¹ The author advised the community that the City had a duty to meaningfully engage the community in the delivery of socio-economic rights. She discussed with the community how engagements

²²⁹ Ibid.

²³⁰ Act 61 of 2003.

²³¹ At the time the advice was sought the author had family ties to the community and had completed her LLB at UCT and was working as a researcher at the Equal Education Law Centre.

with the City on the matter were not successful in the past and that the City held too much power over the community in meetings that were held at its offices. She therefore advised the community to call a meeting with the City in a space chosen by the community. The author further advised the community to invite to its meeting a Chapter 9 institution which will have the power to ensure that the City enforces any obligations it undertakes to the community. Chapter 9 institutions are mandated by Chapter 9 of the Constitution to monitor and investigate the implementation of the rights in the Constitution. The community was specifically advised to approach the SAHRC for assistance because it has a programme in which one of its objectives is to facilitate public participation in the realisation of socio-economic rights.²³²

5.3 Changing the meeting space

In June 2013, the community wrote to the City of Cape Town inviting the Mayor and the MMC for sanitation as well as the SAHRC to a meeting to be held in one of the three affected informal settlements in Gugulethu known as Barcelona. The community gave the City and the SAHRC seven days to confirm their attendance of the meeting. The invitation specified that the City ought to send representatives with decision making powers in the event that an amicable solution is reached so that the servicing of toilets can commence that afternoon.

The SAHRC confirmed its attendance to the meeting well in advance, advising that its then Provincial Manager, Melanie Dugmore, would attend the meeting in person. Unsurprisingly, the City failed to show the same good faith. It only confirmed its attendance on the day of the meeting, informing the community that neither the Mayor nor the MMC would attend but instead Councillor Nqavashe would represent the Mayor. Nqavashe was the ward councillor for the community who had earlier assisted the community in voicing out their complaints about the sanitation situation. He went to the meeting with no delegated power to make decisions about servicing the toilets. Essentially, he was the hand of the Mayor in that meeting without any power to make any pronouncements on the issues at hand.

²³² <http://www.sahrc.org.za/home/index67c7.html?ipkContentID=36&ipkMenuID=40> (30 June 2017).

Although the community had done everything possible to neutralise the space of engagement and deflate some of the executive power which often dominates engagements between the state and the community, the neutralised space was meaningless for the purposes of that engagement. By not showing up to the meeting to take decisions, the City created a situation in which meaningful engagement could not take place by refusing to partner with the community to find solutions.

5.4 The Complaint to the SAHRC

When attempts to meaningfully engage the City of Cape Town in ways that are cognisant of power dynamics in participation spaces failed, the committee representing the community lodged a formal complaint with the SAHRC office in Cape Town. The SAHRC responded to the complaint by inviting the community to a meeting with the City at the SAHRC's offices in Cape Town. The Commission informed the community that only three people from the community should be present at the meeting. The City attended the meeting with a delegation of about seven officials including the MMC for water and sanitation. Although the community was represented in the meeting by a legal representative, the power in the negotiation space was imbalanced numerically as the City had more power over the community in the discussion. The meeting was facilitated by the Provincial Manager of the SAHRC in the Western Cape.

In the meeting, just based on numbers, the City had more time to speak than the community. The City carried a defensive attitude in the meeting. The first question the MMC for sanitation asked was what the Commission actually understood by the term adequate sanitation. It was noticeable from the author, who was present at the meeting as one of the three delegates from the community, how the community representatives who attended the meeting were looked down upon. There are many inferences in the South African context one could read into that. One could infer that their exclusion was from hidden bias over their accents in speaking English; their level of education or even their appearance. It is also notable that at no point in organising the meeting, or on the day of the meeting, did the SAHRC ask whether the community representatives would require interpretation services.

The attitudes demonstrated by the City and even the SAHRC are telling of how the community was viewed as citizens. Essentially, when it comes to issues of socio-economic rights, the community members were regarded merely “users” of the services provided. They had no voice regarding when and how those services were to be provided. In that space, the City maintained its visible power over the community and used it to both intimidate the community and to be dismissive of what was the real issue at hand. There was also hidden power over the community at the meeting. This hidden power excluded the community representatives in the meeting. They were excluded, firstly, through the dictation of numbers for their attendance and, secondly by the use of language in the meeting. They were also excluded from being seen as stakeholders that can contribute to how the deliberation ought to take place and in shaping the agenda of the meeting.

Essentially, the meeting provided no meaningful engagement between the community and the City. The space was not conducive for any amicable and meaningful engagement to take place. The SAHRC did not assist to keep in check the power the City evidently exerted over the community. The fact that there were also no parameters drawn on rights and responsibilities of those who attended the meeting meant that the City could treat the community as a to whom it did not have to account.

The SAHRC subsequently conducted an inspection of the area in which the community lived. Thereafter, it wrote a letter confirming the community’s concerns around the deplorable living conditions they endured that were compounded by the unclean toilets. In one of its publications, the SAHRC stated that it was “deeply concerned about the state of sanitation in these areas [Barcelona, Kanana and Europe] and believe[d] that the current crisis pose[d] a significant health risk particularly to vulnerable communities”.²³³ The SAHRC sent its letter to the City and demanded it to deal with the problem and restore the sanitation services.²³⁴

Whilst the sanitation crisis was taking place in Barcelona, Europe and Kanana, the City of Cape Town was rolling out a version of sanitation facilities known as “portable flush toilets”

²³³ <http://www.sahrc.org.za/home/index67c7.html?ipkContentID=36&ipkMenuID=40> (30 June 2017).

²³⁴ Ibid.

at various informal settlements in Khayelitsha, Cape Town. The portable flush toilets had two parts, the upper part which was a seat and the lower part which is where the human waste was stored.²³⁵ These were toilets the City would provide to each household and which would be serviced by it. The problem with the portable toilets was that they had to be kept inside people's homes which, in informal settlements, could be a very small space of a one room shack. This essentially meant that people would cook and sleep in the same space where they kept their human waste. Informal settlement communities rejected these toilets publicly protested against them.²³⁶

While the SAHRC was attending to the crisis in Gugulethu, the City of Cape Town had called for the SAHRC to assist it in rolling out the portable toilets at various informal settlements in Cape Town.²³⁷ The SAHRC refused this invitation on the basis that there was a pending complaint from the communities regarding the portable toilets.²³⁸ Residents that were affected by the portable flush toilets blocked roads with the toilets in an effort to get attention from the City of Cape Town. On public platforms, the City maintained that people who were still using the bucket system did so of their own accord as it had provided them with portable flush toilets as an alternative.²³⁹

In response to the SAHRC letter about the sanitation crisis in Gugulethu, the City's response was defensive and questioned the SAHRC's visit to the community, calling the Chapter 9 institution ill-informed.²⁴⁰ The Mayor voiced concerns that the SAHRC had conducted a visit

²³⁵ Daily Marverick "Portable flush toilets: What are they and why the fuss?" 13 June 2013 <https://www.dailymaverick.co.za/article/2013-06-13-portable-flush-toilets-what-are-they-and-why-the-fuss/#.WQ2E8I9OJIY> (23 June 2017).

²³⁶ "GroundUp: Cape Town taken to court over toilets" 5 July 2016 <https://www.dailymaverick.co.za/article/2016-07-05-groundup-cape-town-taken-to-court-over-toilets/#.WQ2Jh49OJIY> (23 June 2017).

²³⁷ "De Lille seeks Human Rights Commission's help in toilet wars" 6 June 2013 [https://www.businesslive.co.za/bd/national/2013-06-06-de-lille-seeks-human-rights-commissions-help-in-toilet-wars/\(23 June 2017\).](https://www.businesslive.co.za/bd/national/2013-06-06-de-lille-seeks-human-rights-commissions-help-in-toilet-wars/(23%20June%202017))

²³⁸ <http://www.sahrc.org.za/home/index67c7.html?ipkContentID=36&ipkMenuID=40> (30 June 2017)

²³⁹ "Portable toilets inhumane: residents" 18 July 2013 <http://www.iol.co.za/capetimes/portable-toilets-inhumane-residents-1548671> (23 July 2017).

²⁴⁰ "De Lille slams rights body" 19 June 2013 <http://www.iol.co.za/news/politics/de-lille-slams-rights-body-1534160> (30 June 2017).

to the informal settlements without consulting with the City about it.²⁴¹ This concern was misplaced since the SAHRC does not have to notify the City when carrying out investigations in the affected informal settlements.

On 11 June 2016 the Mayor of Cape Town, Patricia De Lille, went for a 15-minute walk in Barcelona Gugulethu during which time the City's contractors were emptying the bucket toilets. The Mayor, who was wearing a mask during the exercise and was surrounded by the Cape Town Metropolitan Police, spoke to journalists and then left the area.²⁴² The community was unhappy with the visit as it became apparent that she was not in the community to see them but rather to engage with journalists and leave.²⁴³

The engagements with the City and the attempts of the SAHRC to resolve the sanitation crisis in Gugulethu were unsuccessful and were met with an irresponsible attitude from the City. In 2017, the community was still protesting for better sanitation services.²⁴⁴ The only thing the community was able to put across was that they do not want the portable flush toilets. However, in rejecting the portable flush toilets, the City refused to sit down with the community to think through acceptable alternatives.

5.5. Lessons from community Spaces of Participation

There are at least three conclusions that can be drawn from the Gugulethu sanitation crisis. Firstly, when communities are aware that invited spaces of public participation are empty and their voices are not heard, they create their own spaces. In wanting to meet with the Mayor and the SAHRC in Barcelona, Gugulethu, the community wanted to engage with the City of Cape Town and the SAHRC in a space which would set the context for why the meeting to resolve the sanitation crisis was important. The community wanted to be seen. To be seen as citizens and

²⁴¹“De Lille hits out at SAHRC over toilet saga” <http://ewn.co.za/2013/06/19/De-Lille-hits-out-at-SAHRC?w=520&h=416&as=1&crop=1> (23 June 2017).

²⁴² “Mayor’s visit to informal settlement criticised as PR exercise” 11 June 2013 <http://westcapenews.com/?p=6402> (13 May 2017).

²⁴³ Ibid.

²⁴⁴ <http://www.news24.com/SouthAfrica/News/gugulethu-residents-cause-a-stink-over-toilet-cleaning-jobs-20170330> (30 May 2017).

used their power to reject the idea that they were just users of basic services and wanted to be used as partners in thinking through the solutions to their crisis.

Secondly, for a number of reasons, the effectiveness of popular spaces for holding the state to account among other things is dependent on the responsiveness of the state. As articulated above, popular spaces represent a bottom-up approach to public participation.²⁴⁵ The benefit of popular spaces is that they offer communities a chance to form solidarity with one another in finding solutions as alternative to development imposed by government on them. It is from popular spaces of participation that citizens can build up their power base to partner with government to find solutions to their struggles. Arnstein calls this phenomenon of popular spaces “citizenship power”.²⁴⁶

Nonetheless, the community in Gugulethu had done everything in their power to ensure that they call the municipality to a space where they could also exert their power so as to keep the power of the municipality in check when thinking through solutions for the sanitation crisis. Their efforts failed not because they were not creative, but because the City of Cape Town acted as though it was not accountable to the communities for the provision of proper services. The failure was also from the SAHRC’s lack of assertiveness in determining the parameters of engagement between the people and the City by reminding the City of its obligations to engage the people in the provision of basic services. If governments can get away with being irresponsible to citizens about issues of service delivery, efforts to hold the government to account in any space will always be in vain.

Lastly, the Constitution has imbued Chapter 9 institutions with broad powers to hold the state accountable for human rights violations that are caused by the state’s refusal to account to people.²⁴⁷ When these institutions do not utilise these powers optimally, they fail vulnerable communities. In the Gugulethu matter, the SAHRC had powers in terms of its mandate in the

²⁴⁵ Gaventa op cit note 75.

²⁴⁶ Arnstein op cit note 128.

²⁴⁷ Section 184(2)(b).

Constitution to “take steps and secure appropriate redress where human rights have been violated”²⁴⁸ Public participation in state affairs does not guarantee service delivery to improve people’s lives. However, it is through the communication between the state and the citizens that trust between the two can be built in order for comprehensive solutions to the service delivery issues to be reached. Had the City of Cape Town been open to communicate with the communities in Gugulethu and other informal settlements in Cape Town, the City would have avoided wasteful expenditure in rolling out the portable toilets which the communities were not interested in.

By failing to compel the City to meaningfully engage with the communities over the sanitation crisis, the SAHRC did not use all its powers to hold the state to account and, as a result, it failed the communities. To date, the provision of sanitation services is a struggle in informal settlements across Gugulethu. This is something that could have been resolved in 2013 if the SAHRC had insisted on responsive behaviour from the City of Cape Town and demanded meaningful participation of the communities in dealing with the sanitation crisis.

5.6 Concluding observations

Although the foregoing examples of participation depict a picture in which the state fails to be responsive to local communities on service delivery issues, there are instances in which the state and its institutions commence their engagement process by listening to communities. However, even in those instances, in the end, public participation procedures of the state tend to fail.

One example where there has been a degree of cooperation between the state and communities that have sought to realise socio-economic rights by employing public participation as one of their tools is illustrated through the work of the Social Justice coalition (SJC). The SJC with the City of Cape Town conducted a social audit for janitor services for communal flushing toilets in

²⁴⁸ Constitution of the Republic of South Africa section 184 (2) (b).

Cape Town.²⁴⁹ The social audit took place between 14 and 19 July 2014.²⁵⁰ It was a detailed study on the importance of janitor services in Khayelitsha. In addition, the social audit sought to show that if the janitor services became a funded project, it could have a positive impact on people's lives where there were inadequate sanitation services and people were forced to rely on communal flush toilets.

During the course of the study, the City of Cape Town was included as a stakeholder and was presented with objective evidence from the social audit. The City acknowledged the problems raised and confirmed that it already had a draft implementation plan for janitor services.²⁵¹

²⁴⁹ https://d3n8a8pro7vhmx.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1451457794/social_audit_3_janitorial_service_social_audit_report_final.pdf?1451457794 (13 May 2017).

²⁵⁰ Ibid .

²⁵¹ Ibid 48.

CHAPTER VI

CONCLUSION AND RECOMMENDATIONS FOR MEANINGFUL PUBLIC PARTICIPATION

This paper has argued that there has been a growing increase of dissent in the provision of basic services. Basic services are legal entitlements in the form of socio-economic rights in terms of the Constitution. Frustrations with service delivery have increased as a result of the slow pace in the provision of services or because those basic services that have been provided are inadequate. When frustrations of those who are entitled to basic services have been met by an irresponsible behaviour from the state, communities have resorted to what has become known as service delivery protests to make their frustrations known publicly.

Service delivery protest have been used to voice community frustrations on the slow pace of service delivery, but also by communities to take up space and shut municipalities down in an attempt to solicit a responsive behaviour from the state. When peaceful protests have not been responded to, communities have used disruption in the form of burning tyres and other means to demand responses from the state.

The increase in protests has required a study as to whether public participation could be effective in ensuring the realisation of socio-economic rights. Although public participation is one of the many tools to facilitate the realisation of socio-economic rights its effectiveness depends on what is meant by public participation. There are various meanings to public participation. Public participation, although it is complex to define, is a right that communities have in terms of international, regional and national laws in South Africa. South African courts have sought to give meaning to various types of public participation approaches including, consultation, representations and meaningful engagement.

In dealing with socio-economic rights matters, courts have developed the discourse of meaningful engagement, to measure whether there has been effective public participation between communities and the state. Meaningful engagement has been defined as a two-way process in which the state and communities talk and listen to each other, try and understand each other's perspectives so that they can reach a popular outcome.²⁵² The paper has further argued that although meaningful engagement is the most effective standard in holding the state accountable, all public participation processes that are not analysed through the premises of power can amount to empty spaces. It has also argued that public participation processes are always spaces of power contestations between those who want to hold the state to account and those who are mandated to account, being the state.

The power dynamics at play in public participation processes are reinforced by the spaces in which public participation takes place. When public participation processes are organised by the state, they can be spaces of non-participation in which space they only exist for the state to be seen to have done something by merely calling for public participation. In those spaces the voices of the communities are not taken into account as the state may come with set agendas. Subsequently, invited spaces can serve to be very exclusionary to the public. The state may use its power over the public to exclude them in invited spaces of public participation. At times the participation of the public may also be ineffective when dealing with socio-economic rights issues because how the public may not always know the power they hold in terms of their rights in order to make the state to account. The self-imposed exclusion of communities in public participation spaces can be attributed to their internalisation of the irresponsible behaviour they receive from the state. At times, communities may take the irresponsible nature of the behaviours of the state towards them as part of the rules of the game.

It is in creating popular spaces of participation that South African communities have tried to demand responsiveness from the state. Popular spaces in the context of socio-economic rights have been in protests and have been in demanding meetings with the state in communities to show their reality as they negotiate for service delivery. Nonetheless, it is in the treatment of

²⁵² Chweni and Tissington op cit note 175.

communities as citizens that determines the kinds of responses they will get for the provision of services as a result of public participation.

This paper has explained that there are three kinds of citizenship. Communities are either treated as “users” which is the kind of citizenship in which citizens are mere users of services with no power to decide the kinds of those services; they can either accept services provided by the state or get no services at all. Citizens can also be treated as “choosers”; choosers can choose the kinds of service they want from the state, but in this category only the dominant voices get to choose. Lastly, citizens can also be treated as “rights-bearers”. This is the type of citizenship in which communities are entitled to hold the state accountable for things as a result of the rights they have as communities.

In South Africa, citizens are entitled to hold the state to account for the provision of basic services as a result of the rights they have to those services and the duties imposed on the state to provide them. Nonetheless, besides being rights-bearers as citizens, South African citizens have still been unable to hold the state accountable in the provision of basic services because of the power the state has used over them to keep them out of the deliberations about service delivery processes. Part of that power has been invisible power which poor communities have internalised their exclusion to be rules of the game and not challenge state institutions for their exclusion.

In conclusion, it is submitted that public participation as one tool in the arsenal of instruments to realise socio-economic rights, can be an effective tool to facilitate the realisation of such rights under three conditions. Firstly, there is need for popular education in South Africa on mechanisms to hold the state to account and demanding a responsive behaviour. Secondly, because who the municipality changes every five years, it also is important to have periodic education spaces for officials on their responsibilities to involve and account to the public in the provision of basic services. Lastly, there is a need to increase the visibility of chapter 9 institutions in communities in order for them to be perceived by communities as safe guard of our democracy and in turn functioning as a second layer of accountability for the state.

One of the reasons that have made it difficult for communities to hold the state to account on the slow pace of service delivery and its failures to realise socio-economic rights has been the lack of knowledge of the mechanisms that communities can use to demand responsiveness from the state. There are many reasons for this lack of knowledge; one of them has been based on the fact that the shift to a democratic government in 1994 did not necessarily mean a shift in the minds of the people in relation to their relationship to the state. The black communities that were excluded from the citizenship of South Africa under Apartheid prior to 1994 moved from the exclusion to a space where they were suddenly citizens. What was lost in the transition to a democracy is education or information sharing on what being a citizen has come to mean for all South Africans and the responsibilities and benefits it came with.

In 2017, with difficulties that community face in attempts to hold the state to account for the provision of basic services and the apparent lack of responsiveness, there is a need to do mass public education on what that citizenship entails for communities and its benefit and responsibilities. It is submitted that kind of mass education should take the form of popular education. The idea of popular education comes from the work of a Brazilian author Paulo Freire.²⁵³ Popular education describes a type of education which is distinguishable from formal education for its aim to empower people who particularly feel marginalised and in the process their participation in the education is required.²⁵⁴ It has at times been defined in simple terms as the “education component of community organising”.²⁵⁵

Popular education for communities on mechanisms to hold the state to account can be conducted by community activists who would have been trained on the subject by activist academics who study and teach the subject. This kind of education can include what rights communities have to services provided by the state, but over and above that the responsibilities of the state to involve the communities in its plans to realise those rights. The education can also include teachings on the citizenship the Constitution promises in an attempt to shift the shackles

²⁵³ www.populareducation.co.za (14 August 2017).

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

of invisible power that bound people in deplorable conditions due to their perceived inability to hold the state to account to them.

Educating municipalities on their obligations to facilitate public participation that is meaningful for the realisation of socio-economic rights can have many benefits for communities as well. Such education can teach municipalities how they can save money in their budgets through designing development projects in partnership with the communities. Such education can also avoid litigation that sees municipalities often taken to courts as a result of the manner in which their decisions or failure to take decisions violate the rights of communities.

Lastly, as much as there are Chapter 9 institutions in each province, they can be very far to the most vulnerable and struggling communities since most of their offices tend to sit in the capital cities. The distance between Chapter 9 institutions and communities not only creates knowledge gaps from communities in understanding what the institutions do, the distance also exacerbates the abuse the most vulnerable communities must take from their municipalities because of not knowing who to call when municipalities are irresponsive. Chapter 9 institutions need to be visible in poor communities in order for them to know what the institutions do and in so doing serve as a deterrent to municipalities that violate the rights of communities.

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